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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1935

No. 312

THE BALTIMORE AND OHIO RAILROAD COMPANY,
THE PENNSYLVANIA RAILROAD COMPANY,
THE RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, *et al.*,
Appellants

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ATLANTIC COAST LINE RAILROAD COMPANY, *et al.*,
Appellees

Appeal from the District Court of the United States For the Eastern District of Virginia

BRIEF FOR APPELLANTS

E. L. BEACH
JOSEPH F. ESHELMAN
M. CARTER HALL
JERVIS LANGDON, JR.
CHARLES R. WEBBER
Solicitors for Appellants

FREDERIC D. MCKENNEY
Of Counsel

Washington, D. C.,
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PRESS OF W. F. ROBERTS COMPANY, WASHINGTON, D. C.

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Appeal from the District Court of the United States For the Eastern District of Virginia

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the specially-constituted District Court (*Baltimore & O. R. Co. et al.* v. *United States*) is reported at 9 Fed. Supp. 181, and is reproduced in the record at pages 226-63. A memorandum opinion denying an application for stay, unreported, appears in the record at page 294.

The reports of the Interstate Commerce Commission, which are made a part of the orders assailed, are published at 194 I. C. C. 729 and at 198 I. C. C. 375. These reports are of record at pages 39-79 and 79-94, respectively.

QUESTION PRESENTED

The question presented is whether the orders of the Commission dated July 3, 1933 and January 8, 1934, as amended (R. 1623-33), herein referred to as the order, prescribing, as between appellants and certain Southern rail carriers, divisions of joint through rates on citrus fruit from Florida to destinations on appellants' lines in Official Classification territory * should be permanently enjoined and set aside. Appellants contend that the order should be held invalid and void—

> (1) because it requires appellants to accept divisions which are as to them, and each of them, confiscatory, in contravention of the Fifth Amendment to the Constitution of the United States, and in violation of Section 15(6) of the Interstate Commerce Act;
>
> (2) because the Commission subordinated all matters which, under Section 15(6) of the Interstate Commerce Act, it is required to consider to the element of Southern lines' supposed financial needs; and
>
> (3) because, while purporting to give "due consideration" to a "fair return" on railway property of the Southern lines, as required by Section 15(6) of the Interstate Commerce Act, the Commission considered only the rates of return of said Southern lines from the *entire*

* Official Classification territory, herein referred to as Official territory, may be defined generally as that part of the United States lying east of the Mississippi and north of the Ohio and Potomac Rivers, including New England, portions of Virginia and West Virginia, and certain destinations in Missouri, Iowa, and Wisconsin. It is made up of three sub-territories, viz., Central, Trunk Line, and New England territories. The dividing point between Central and Trunk Line territories is the Buffalo-Pittsburgh line.

operations of such lines instead of a fair return on Southern lines' property *fairly attributable to the service of transporting citrus fruit.*

The order as to the future became effective on June 1, 1934, and is of continuing character, but by another provision it requires that an adjustment be made in accordance with the prescribed divisions on all shipments to Trunk Line and New England territories that moved subsequent to November 22, 1930. Between that date and June 1, 1934, 85,904 cars of citrus fruit so moved (Clark's Ex. No. C-6) and the ultimate payment by appellants to Southern lines of approximately $1,200,000 (R. 1256), is involved under such retroactive readjustment. The retroactive provision was construed by the court below as merely requiring the restatement of accounts. In denying the application for a stay that court said (R. 295):

> "* * * The only effect of the restatement of accounts will be to put the Southern lines in position immediately to bring suit for the amount shown to be due. In the natural course of events, these suits will hardly be reached for trial before the case is decided on its merits by the Supreme Court of the United States, and it seems unlikely to us that any court would be willing to hear and determine the issues that would be involved in such cases, including the issue of confiscation, while this case is pending in that court. * * *"

STATUTE INVOLVED

The statutory provision involved is Section 15(6) of the Interstate Commerce Act, which authorizes the Commission, after hearing, to prescribe just, reasonable, and equitable divisions of joint rates. It is set forth in Appendix "A."

Appellants also rely upon the Fifth Amendment to the Constitution, likewise set forth in the same appendix.

STATEMENT OF THE CASE

This is an appeal by The Baltimore and Ohio Railroad Company and other Northern lines, herein referred to interchangeably as appellants or Northern lines, from the final decree (R. 269-72, 278) of a specially-constituted (three-judge) District Court, which dismissed appellants' petition to enjoin and set aside the Commission's order, hereinbefore mentioned, *ante* page 2, (R. 1623-33), entered in connection with its original and supplemental reports in consolidated proceedings entitled No. 24069, *Atlantic Coast Line Railroad Company, et al.* v. *Arcade & Attica Railroad Corporation, et al.*, and No. 24160, *In re Divisions of Joint Interterritorial Rates between Official and Southern Territories*, 194 I. C. C. 729 (R. 39-79); 198 I. C. C. 375 (R. 79-94).

The proceeding before the Commission was initiated by the Atlantic Coast Line, the Seaboard Air Line, and certain other railroad companies serving Florida, all herein called "Southern lines." On November 22, 1930, they filed the complaint in No. 24069, against appellants and other Northern lines, alleging that the divisions which they received from the Commission-prescribed joint rates applicable to the transportation of citrus fruit, in carloads, from origin points in Florida to destinations in Trunk Line and New England territories were unjust, unreasonable, inequitable, unduly prejudicial, and otherwise in violation of the Interstate Commerce Act (R. 40). They asked the Commission to pre-

scribe just, reasonable, and equitable divisions for the future and to require an adjustment of the divisions from the date of the filing of the complaint (R. 40).

On April 20, 1931, Northern lines filed a cross-complaint against the original complainants making substantially similar allegations concerning the divisions received by them out of the same joint rates on citrus fruit from Florida. They also sought just, reasonable, and equitable divisions for the future and prayed for retroactive application of the prescribed divisions to the date of filing of the cross-complaint.

No. 24160 is a general investigation instituted by the Commission on January 3, 1931, in response to a petition of the railroads in Official territory, to determine whether the present divisions of joint rates on classes and all commodities between points in Official territory, and points in Southern territory are unjust, unreasonable, inequitable, or unduly preferential and prejudicial as between the carriers parties thereto, and if so, what will be the just, reasonable, and equitable divisions to be received by respondents; also whether such divisions shall be retroactive to the date of the institution of the investigation as to such rates as the Commission may have prescribed. Inasmuch as the divisions of rates on citrus fruit to Trunk Line and New England territories were already in issue in No. 24069, they were excluded from No. 24160, which included divisions of rates on citrus fruit to Central territory only.

To prevent duplication, the general investigation was set for hearing on the same record with No. 24069, but the only rates specifically covered by the

evidence which had been received in the general investigation prior to the submission of this case to the Commission were those on citrus fruits to Central territory. The practical effect of the procedure was thus to segregate an issue concerning divisions of rates on citrus fruit moving from Florida to destinations in Official territory from the general divisional controversy between appellants and the Southern lines (R. 41).*

*Hearings have now been had and briefs filed by Northern and Southern lines in the Commission's general investigation, No. 24160, as to divisions of rates on classes and commodities generally.

Antecedents of the Instant Proceeding

In *Fla. Frt. & Veg. Shprs. Protect. Asso.* v. *A. C. L. R. R. Co.*, 14 I. C. C. 476 (1908), the Commission prescribed from Jacksonville and other north Florida junctions to destinations in Official territory rates (called "proportional" rates) to be added to other rates (called "gathering charges") from citrus producing points in Florida to such north Florida junctions. Northern lines' agreed divisions of the proportional rates were specific amounts (called "specifics") per box, of an estimated weight of 80 pounds, for their services north of the gateways, of which Richmond, Va., was and is the most important.

In 1915, and again in 1917, increased costs of operation, and other changes in transportation conditions, impelled the Commission to find that appellants were entitled to general rate increases of 5 and 15 per cent, respectively (*The Five Per Cent Case*, 31 I. C. C. 351, 32 I. C. C. 325; *Fifteen Per Cent Case*, 45 I. C. C. 303). In these cases the Commission specifically authorized increases in all interterritorial rates to permit appellants to secure these respective measures of increase in their divisions. Appellants sought to secure such increases in the citrus fruit rates and in their divisions thereof, but Southern lines would not agree thereto. Moreover, despite the Commission's recognition of the increased value of appellants' service, their divisions of the citrus fruit rates were not revised to reflect the resulting change in the relative worth of their service contribution (R. 72, 561-66).

In 1918, the citrus fruit rates, in common with rates generally, were increased 25 per cent by authority of the Director General of Railroads, and

the divisions of the Southern and the Northern lines were increased in that ratio. In *Ex Parte 74, Increased Rates, 1920*, 58 I. C. C. 220, the Commission found that the Southern and the Northern lines were entitled to general increases of 25 to 40 per cent, respectively. The citrus rates, in common with other interterritorial rates, were increased 33 1/3 per cent, which was more than enough to have given Southern and Northern lines respective increases of 25 and 40 per cent, but the divisions of both sets of carriers were increased 33 1/3 per cent. The result, of course, was that Northern lines obtained less, and Southern lines much more, than the Commission had found proper within their respective territories (R. 72, 561-66). Based on actual receipts of citrus fruit at important Trunk Line and New England destinations in the years 1927 to 1930, inclusive, Southern lines received an annual increase in revenue, over and above the 25 per cent increase authorized intraterritorially within the South, of from $198,028.50 in the low year to $311,639.00 in the high year (R. 597-98).

Prior to the prescription in 1928 of new joint through rates on citrus fruit from Florida producing points to Official territory, the divisions of which are here involved, Northern lines' divisions of the old rates had become wholly inadequate properly to compensate them for their services in transporting and delivering citrus fruit because they failed to reflect the greater measure of general increases in rates authorized for Official territory than for the South. Throughout the period 1915-1928, Northern lines had expressed dissatisfaction with their citrus fruit divisions and had unsuccessfully sought increases therein (R. 72, 561-67).

The new joint citrus fruit rates prescribed in 1928, in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603 (herein sometimes called the *Florida Case*), supplanted the former basis of rates which, as noted, were made up of gathering charges to the north Florida junctions and proportional rates beyond.* The primary reason for the moderate reductions that ensued from this decision was the changed and improved conditions in Florida, which the Commission found justified the elimination of the gathering charges and the establishment of "what are in fact, as well as in name, joint through rates. * * *"

In apportioning the rates that were in effect prior to 1928, the Florida lines were allowed their "gathering charges," and Northern lines participated in only the portion of the joint rate representing the service north of Jacksonville or other north Florida junctions. The deflation in the excessive gathering charges effected by the prescription in 1928 of new joint rates properly fell wholly on the Southern lines.

Northern lines' divisional "specifics" of the proportional rates from north Florida junctions were originally converted from amounts per 100 pounds to amounts per box upon the assumption, and the assurance of Southern lines, that the estimated weight of 80 pounds was ample to cover the actual average weight per box of all citrus fruits, which include oranges, grape fruit, lemons, limes, pineapples, and other articles taking the same rates as oranges and grape fruit. At no time did Northern lines agree, or consent to transport, more than an average of 80

*While these rates were generally published in single amounts from producing point to destination, the basis therefor was the combination of the rates to and from the north Florida junctions.

pounds of citrus fruit under their per box specifics (R. 555, 573, 609-11, 617, 621-27).

For this reason, when the Commission in 1928 prescribed the new joint rates on citrus fruit in amounts per 100 pounds, the Northern lines in Trunk Line and New England territories reconverted their per box specifics to amounts per 100 pounds by the use of the same 80-pound factor as had originally been used in converting to amounts per box (R. 577). To the extent, therefore, that the 80-pound estimated weight may have understated the actual average weight of all citrus fruit transported, the effect of this method of reconversion operated to give them increased divisions per 100 pounds. The carriers in Central territory, at the urgent request of Southern lines, and as a temporary measure only, converted their divisional per box specifics to a 100 pound basis using a 90-pound factor (R. 375, 573, 577, 578, 628).

The resulting basis of divisions was not satisfactory to Northern lines, because it failed to reflect the increased value of their services due to relative changes in transportation conditions in Official and Southern territories, and due to the greater measure of general increase authorized by the Commission for Official than for Southern territory. However, at this juncture there was pending between Northern and Southern lines the question of determining upon new divisions of interterritorial class and commodity rates which had been recently prescribed by the Commission (R. 576). Pending such determination of the divisions of the interterritorial class rates, to which the prescribed citrus rates bear a general percentage relation, Northern lines, as a provisional matter only, retained only their old per box specifics converted

to amounts per 100 pounds on the 80 pound basis. At no time did Northern lines consent or agree to such provisional basis as being sufficient or reasonable for their services (R. 573-74, 577-78).

In 1929, Northern and Southern lines agreed to join in petitioning the Commission for a general investigation of divisions of prescribed interterritorial rates, including the rates on citrus fruit. Southern lines delayed, however, for about a year in acting on the joint petition, and made no final reply until the filing by them on November 22, 1930, of their complaint in respect of the divisions of citrus fruit rates to Trunk Line and New England territories. The Southern carriers then refused to join in a general petition, and the Commission's investigation, No. 24160, covering divisions of interterritorial rates generally, was begun on petition of the Official territory lines. That proceeding is now pending before the Commission.

The Nature of, and Basis for, the Commission's Order Prescribing Divisions.

The original report of the Commission (R. 39-79), made a part of its order prescribing divisions, discloses the nature of, and basis for, such order.

The prescribed basis of divisions puts upon Southern lines the entire reductions in the rates which followed the elimination of the excessive gathering charges, but gives to Northern lines only slightly more on the whole than they had obtained out of their divisions prior to 1928. But the latter were never revised properly to reflect the greater measure of general rate increases authorized by the Commis-

sion in 1915, 1917, and 1920, for Northern than for Southern lines.

The Commission's report makes no attempt to support the divisional basis prescribed upon any recognized standard for appraising the relative service contributions of two sets of carriers, such as a mileage prorate, or a rate prorate. Its findings rest wholly upon the alleged *slightly worse financial condition* of Southern lines, and its *presumption* that confiscation will not result to Northern lines in view of its granting them out of the new rates slightly greater revenue than under their divisions in effect prior to 1928.

Specifically, on this point, the report states (R. 74-75):

> "The statute empowering us to prescribe divisions lists a number of elements to which we 'shall give due consideration among other things' but does not specify any one of these elements as of paramount importance. Nor do the decisions of the courts. The Supreme Court has said that we must consider the financial condition of the carriers but are not required to make that the only test.[7] It has likewise stated that—
>
> > "'relative cost of service is not the only factor to be considered in determining just divisions; [that we] may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest "in order to maintain it in effective operation as part of an adequate transportation system," provided the share left to its connec-

[7 *Beaumont, S. L. & W. Ry.* v. *U. S.*, 282 U. S. 74, 87.]

tions is '*adequate to avoid a confiscatory result.*'[8]" [Italics supplied.]

"The divisional agreement which was in force from 1908-10 until November 9, 1928, is pertinent in two respects. (1) It may be presumed that the agreement, having been voluntarily entered into, was not confiscatory of the property of either group of carriers when it was entered into, and the evidence of changing conditions between the dates above set forth is not convincing that it subsequently became so. (2) The agreement affords a method of comparing the effect of subsequent divisional bases on the freight revenues of the respective groups. In so considering the former basis of divisions we think that it was somewhat unfavorable to the northern lines, in that in 1920 those lines received the same percentage increase in their divisions as the southern lines, when the rates in the eastern district were increased 40 percent and only 25 percent in the South. A similar situation was taken into account in *Erie R. R. Co.* v. *A. & V. Ry. Co.*, 98 I. C. C. 268, 280.

"The rates prescribed in the *Florida case,* which we are here called on to divide, represented moderate reductions in the former rates, as before shown. As indicated by the report in that case, the reduced rates were prescribed quite largely in the light of evidence concerning improved conditions on the Florida lines which had arisen since the former rates were established. At the date of submission of the *Florida case* the southern carriers had for several years been enjoying substantial prosperity. In 1926 the volume of rail traffic in the South reached its peak for the period 1922-31, and this was also true of the traffic of the eastern group. There-

[[8] *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 285.]

after a recession set in which has been more declivitous in the South, resulting in a decrease of 38 percent in 1931 under 1926, compared with 31 percent for the eastern group. The Florida lines have been much more seriously affected, their average decrease being 45 percent. The trend of citrus-fruit traffic has, however, been counter to this. Since our decision in the *Florida case* production has continued to increase, and in 1931, 63,770 carloads of citrus fruit originated in the southern region, setting what appears to be a new high record. The increased movement has much more than offset the moderate rate reductions resulting from that case, but because of the contraction in other classes of traffic the relative importance of citrus fruit to the southern carriers, particularly the Florida lines, has been much enhanced by these opposing trends. On consideration of the elements pointed out in the report in the *Florida case,* before referred to, on which the rates there prescribed were based, we are of the view that the revenue reductions caused by those rates should be absorbed by the southern lines, and that some weight should be given to the fact that those lines in 1920 received increases in revenue from this traffic which exceeded in percentage the rate increases within the South. We find nothing in the record supporting the view that the eastern lines are entitled to such a large share of the revenue as that accruing from the amounts they have withheld since November 9, 1928. *The worse financial condition of the southern lines negatives such a view.*" (Italics supplied.)

Immediately after the foregoing findings the report follows with the ultimate finding "that just, reasonable and equitable divisions of the rates on

citrus fruit from Florida to points in Official territory, prescribed in the *Florida Case,* would be those determined by" a plan which it then outlined.

Commissioner Eastman wrote a dissenting opinion, in which three of the other nine Commissioners voting joined (R. 77-78), on the ground that "the divisions prescribed are much too favorable to the southern lines," and further that "to reach their conclusions the majority are obliged to lean heavily on history and on the fact that while both sets of carriers are badly off financially, the southern lines appeared to be worse off than the northern."

The general plan of the divisions prescribed was as follows (R. 76-77):

> "* * * The so-called Florida arbitrary [*] should be deducted from the rate and added to the share of the southern lines hereinafter determined. The remainder of the rate should be divided on 2-figure percentages, the percentage of the southern lines to be based on the factor in the scale of southern factors set forth in the appendix for the short-line distance from point of origin to the gateway and the percentage of the northern lines to be based on the factor in the scale of northern factors set forth in the appendix for the short-line distance from the gateway to destination. To dispose of fractions add one to the percentage having the larger decimal, and if the decimals are equal, add one to the percentage of the northern lines."

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* These arbitraries, known as Appendix L-2 arbitraries because they were set forth in Appendix L-2 to the report in *Southern Class Rate Investigation,* 128 I. C. C. 567, are amounts added to the rates in recognition of the less favorable transportation conditions in Florida. They average about 6 cents per 100 pounds, or over $19.00 per car, and accrue entirely to Florida lines (R. 1242-43).

The scales of factors referred to in this quotation are as follows (R. 79):

"Scale of Southern Factors		Scale of Northern Factors	
600 miles and less	161	240 miles and less	44
620 miles and over 600	164	260 miles and over 240	46
640 miles and over 620	167	280 miles and over 260	49
660 miles and over 640	170	300 miles and over 280	51
680 miles and over 660	173	325 miles and over 300	54
700 miles and over 680	176	350 miles and over 325	57
720 miles and over 700	179	375 miles and over 350	60
740 miles and over 720	182	400 miles and over 375	63
760 miles and over 740	185	425 miles and over 400	66
780 miles and over 760	188	450 miles and over 425	69
800 miles and over 780	191	475 miles and over 450	72
825 miles and over 800	194	500 miles and over 475	75
850 miles and over 825	197	525 miles and over 500	78
875 miles and over 850	200	550 miles and over 525	81
900 miles and over 875	203	575 miles and over 550	84
925 miles and over 900	206	600 miles and over 575	87
950 miles and over 925	209	625 miles and over 600	90
975 miles and over 950	212	650 miles and over 625	93
1,000 miles and over 975	215	675 miles and over 650	96
		700 miles and over 675	99

These scales should be continued at the same rate of progression for greater distances than those here shown."

For equal hauls north and south the southern factors are very materially higher than the northern factors. For 700 miles on each side the factors are 176 south and 99 north, a ratio of 1.77 to 1 (R. 82). Expressed in percentages this means that for equal hauls north and south of 700 miles, Southern lines will get 64 percent of the revenue and Northern lines but 36 percent. To receive the same revenue as Southern lines receive for 700 miles, appellant Northern lines would have to handle the traffic a distance of 1350 miles, or almost twice as far.

For the weighted average haul of citrus fruit from Florida to Official territory, typified by a shipment from Lake Wales, Florida, via the Richmond gateway to Altoona, Pa., the Northern lines would receive under the prescribed divisions only 22.6 per cent of the total revenue for performing 30 per cent of the

total haul, despite the recognized rule that earnings per mile should vary inversely as the length of haul. *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I. C. C. 729, 740 (R. 52, 53).

Subsequent to the promulgation of the original report, defendants filed a petition for rehearing. The case was reopened for reconsideration on the record as made, and the Commission's report on reconsideration appears at pages 79 to 94 of the record.

Thereafter appellants filed a second petition for rehearing (R. 1578), supported by an affidavit and a cost study covering thousands of cars to destinations in Trunk Line territory (R. 1610), alleging that the divisions prescribed were confiscatory. While this petition was denied, the vote was 5 to 4 (R. 1548). Commissioner Eastman and Commissioner Brainerd, both of whom formerly voted against the majority report, were absent. In substance, therefore, *while the order before this Honorable Court represents the action of the Commission, the fact remains that of the eleven commissioners who at one time or another have considered the Commission's report six have either voted against it or to reopen the case for further hearing.*

PROCEEDINGS IN THE COURT BELOW

Shortly after the Commission denied appellants' second petition for rehearing, a petition (R. 1) was filed by The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, and the Richmond, Fredericksburg and Potomac Railroad Company to enjoin and set aside the Commission's order of January 8, 1934, as amended, naming the United States of America as defendant, and it filed an answer (R. 112). The Interstate Commerce Commission, the Atlantic Coast Line Railroad Company, and certain other Southern carriers, intervened as defendants, and likewise filed answers (R. 98, 102, 119). The Boston & Maine Railroad and other Official territory carriers, which had been defendants or respondents in the Commission-proceedings, intervened in behalf of appellants (R. 105). Subsequently, appellants were permitted to amend their petition. These amendments related particularly to Paragraphs XVII-(d), XVIII-(c), XIX-(f) and XXII of the original petition (R. 146-50). The intervening petition was similarly amended (153). Answers to the petitions, as amended, were filed by the defendants (150-57). Hearing was held before a three-judge court, consisting of Circuit Judge Morris A. Soper, and District Judges Luther B. Way and W. Calvin Chesnut (R. 97), during the entire week beginning September 17, 1934.

The record before the Commission, with all exhibits, was introduced before the lower court (R. 1213), as was a copy of the Commission's minute entry denying the second petition for rehearing (R.

1548). In addition, the court took 1,066 pages of oral testimony and received 70 exhibits.*

On December 1, 1934, the court rendered its opinion denying the injunction sought (R. 226-63). The court made no separate findings of fact and conclusions of law for reasons given in the opinion (R. 262), and in a letter written by Circuit Judge Soper to the parties the day before the decision was announced (R. 263). A final decree denying the prayer of the petition, and dismissing the petition and intervening petition, was filed December 31, 1934 (R. 269). From the final decree this direct appeal was taken under the provisions of the Urgent Deficiencies Act of October 22, 1913; 38 Stat. L. 219 (U. S. C., Title 28, secs. 41 (28), 42-48).

* Planographed copies of the exhibits introduced in court have been supplied to this court and to the parties. The exhibits introduced before the Commission, Nos. 1 to 358, inclusive, are on deposit in the Clerk's office of this court as original exhibits (R. 299). Both the record before the Commission and that before the District Court have been narrated in accordance with Equity Rule No. 75, and this narration, along with the stipulation, was approved by the District Court (R. 300).

SPECIFICATION OF ERRORS

1. The Commission's order, as amended, was and is illegal and void because it requires appellants to accept, out of prescribed and non-confiscatory joint through rates on citrus fruit from Florida to destinations in Official territory, divisions for their hauls which are as to them and each of them confiscatory, in direct contravention of so much of the Fifth Amendment to the Constitution of the United States as provides that "no person shall be * * * deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation." (Assignment of Errors Nos. 1 to 9, inclusive.)

2. The Commission's order, as amended, was and is arbitrary, illegal, and void because the Commission did not, as required by Section 15(6) of the Interstate Commerce Act, give due consideration to the amount of revenue required by appellants and each of them to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transporting citrus fruit. (Assignment of Errors Nos. 1 to 9, inclusive.)

3. The Commission's order, as amended, was and is arbitrary, illegal, void, and in excess of the Commission's statutory powers in that the Commission erroneously subordinated all matters, which under Section 15(6) of the Interstate Commerce Act it is required to consider, to the element of Southern lines' supposed financial needs. (Assignment of Error No. 10.)

4. The Commission's order, as amended, was and is arbitrary, illegal, void, and in excess of the Com-

mission's statutory powers in that, while purporting to give "due consideration" to a "fair return" on railway property of the Southern lines, as required by Section 15(6) of the Interstate Commerce Act, it considered merely the rates of return of said Southern lines from the entire operations of such lines, instead of giving due consideration to a fair return on Southern lines' property fairly attributable to the service of transporting citrus fruit, which the Commission found "was by far the most lucrative traffic" enjoyed by the principal Southern carrier. (Assignment of Error No. 11.)

SUMMARY OF ARGUMENT

I. The District Court erred in failing to find that the Commission's order is invalid because the divisions prescribed for appellants are so low for particular hauls, for individual carriers, and for appellant rail lines in the aggregate, that they fail to cover operating expenses and taxes reasonably and fairly allocable to the traffic, in contravention of the Fifth Amendment to the Constitution and in violation of Section 15(6) of the Interstate Commerce Act.

(a) Appellants' cost evidence, which is based on their respective system unit expenses for handling all freight traffic, is sound in theory because the Commission has found (1) that while the voluminous evidence descriptive of operating conditions can not be translated into terms of cost "it indicates that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight, and that both the Eastern and Southern carriers have equipped their plants and operating organizations to this end," (R. 73); and (2) that while ordinarily it would be unsound to use a system unit cost to determine cost over a particular portion of a system line, where it is indisputable that such costs are greater than elsewhere on the system "it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost" over such portion of a system line. *Georgia Public Service Commission* vs. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 184.

(b) The cost to appellants of transporting citrus fruit per unit of traffic, from points used in the Commission's order as gateways or dividing points

for determining divisions to destinations in Official territory, is shown by the evidence to be more than the average cost of transporting all freight per unit of traffic on their respective systems.

(c) The principal portions of their respective system lines necessarily used by appellants in the transportation of citrus fruit from the gateways or dividing points used by the Commission for determining divisions to destinations in Official territory, are shown by the evidence to be relatively more expensive to operate than their respective system lines.

(d) For light loading traffic, such as citrus fruit, requiring a specialized and expedited service, the average total car mile expense unit for all traffic (a unit which takes into account both loaded and empty hauls) furnishes a reasonable basis of approximating the cost of handling citrus fruit, although undoubtedly less than the actual cost to appellants of performing that service.

(e) Using statistics for the year 1929, and allocating expenses to citrus fruit traffic on basis of their respective system total freight car mile units, appellants' costs and expenses reasonably chargeable to the transportation of citrus fruit handled by them, together with an allowance for taxes fairly attributable to that service, plus car rental, are shown by the record to exceed for particular and typical hauls, and closely approach for others, the total gross revenue in the aggregate and per car that would be received by appellants from the prescribed divisions. Based on a study of 17,324 cars moving during the 1928-29 shipping season from Atlantic Coast Line and Seaboard Air Line origins in Florida to destinations

reached by single-line hauls of the Pennsylvania Railroad and the Baltimore and Ohio Railroad north of Potomac Yards, Va., the total revenues received by appellants north of Richmond, Va., from the prescribed divisions would have been $1,247,237.52, divided as follows: Pennsylvania $748,339.98; Richmond, Fredericksburg & Potomac $411,051.64, and Baltimore & Ohio $87,845.90; that the costs and expenses reasonably chargeable to the transportation of citrus fruit, plus a reasonable allowance for taxes, would have been $1,300,707.31, divided as follows: Pennsylvania $813,918,88; Richmond, Fredericksburg & Potomac $412,311.20, and Baltimore & Ohio $74,477.23; that the revenues received from the prescribed divisions would have been in the aggregate insufficient by the sum of $53,469.79 to pay said costs and expenses; that as to two of appellants there would have been individual deficits as follows: Pennsylvania Railroad $65,578.90, Richmond, Fredericksburg & Potomac $1,259.56; that as to appellant the Baltimore & Ohio, the prescribed divisions would have produced a very narrow margin over the estimated costs and expenses of handling the traffic and merely a nominal return upon the value of the property used in the service of transporting citrus fruit. Using exactly the same formula for determining expenses, Southern lines, under the prescribed divisions, received in the aggregate, as available for return on investment, a sum approximating $1,767,078.86 in excess of estimated expenses, equivalent to a return of 12.95 per cent on property fairly attributable to the handling of citrus fruit.

Based on a study of 4,662 cars moving to Central territory destinations, Northern lines' revenues under

the prescribed divisions exceeded the estimated expenses by only $52,607.15.

The studies relied upon are supported by this court's decision in *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1, 6-7, and in *Smyth* v. *Ames*, 169 U. S. 466.

Since appellants' costs and expenses reasonably chargeable to the transportation of citrus fruit exceed for particular hauls, for individual lines, and for appellants in the aggregate, the revenues that they would receive under the prescribed divisions, the order of the Commission is in contravention of the Fifth Amendment to the Constitution and in violation of Section 15(6) of the Interstate Commerce Act.

In addition, this court has held that when one group of carriers is given a greater share of joint rates because of "financial needs," the share remaining for the other group must be "adequate to avoid a confiscatory result."

New England Divisions Case, 261 U. S. 184, 194-95;
Dayton-Goose Creek Ry. v. *U. S.*, 263 U. S. 456, 477.
United States v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 284-85.

This court has also held that where rates found by a regulatory body to be compensatory are attacked as confiscatory, the courts may inquire into the method by which its conclusion was reached, and if the method pursued is fundamentally erroneous it constitutes a denial of due process of law.

Chi. etc. Ry. v. *Pub. Util. Comm.*, 274 U. S. 344, 351;
Nor. Pac. v. *Dept. of Public Works*, 268 U. S. 39, 44.

The method pursued by the Commission and the court below in arriving at their respective determinations that the prescribed divisions were not confiscatory was fundamentally erroneous and constitutes a denial of due process of law.

(f) In connection with the only other available unit, namely, the system cost per gross ton mile, the court below said:

> "It was generally agreed that if the latter method were employed, the cost of carrying a light commodity like citrus fruit in expedited service would be underestimated since the gross ton mile basis apportions an unduly large share of the aggregate system expense to heavier classes of traffic such as coal which are in fact cheaper to carry" (R. 248).

And further:

> "It is probable when the light loading and expedited service of citrus fruit are considered, their costs measured on the average gross ton mile basis would not be as great as the cost of carrying citrus fruit" (R. 257).

Even using as a unit the cost per gross ton mile, studies submitted by appellants show that appellant Richmond, Fredericksburg & Potomac Railroad would have incurred a substantial deficit on the 17,324 cars included in the study, and the Pennsylvania would have received merely a nominal return of 1.91 per cent on the investment properly allocable to the traffic.

II. The grounds relied upon by the court below in rejecting appellants' cost studies are unsound, and the contentions advanced by appellees (defendants below) are entirely without merit.

III. To the extent that divisions may be lawfully prescribed in the aggregate they may be declared confiscatory in the aggregate. This is a necessary concomitant of the group system of rate-making and the group method of fixing divisions. The law must contemplate that confiscation with respect to a large divisional adjustment prescribed "in the aggregate" may be shown in a practical and feasible way.

IV. The District Court erred in failing to find that the order of the Commission is arbitrary and in excess of its statutory powers, because the Commission erroneously subordinated all matters which, under Section 15(6) of the Interstate Commerce Act, it is required to consider to the single element of Southern lines' supposed "financial need." The Commission in its report reviewed numerous factors which under the Act it is required to consider. Its findings as to practically all of these factors were favorable to appellants. Yet it concluded that "we find nothing in the record supporting the view that the eastern lines are entitled to such a large share of the revenue as that accruing from the amounts they have withheld since November 9, 1928," a statement which is explainable only by the sentence immediately following it, that "the worse financial condition of the southern lines negatives such a view" (R. 76). That "financial need" was the predominating factor underlying the Commission's order is also shown by the opinion of the four dissenting commissioners (R. 78).

Under Section 15(6) of the Interstate Commerce Act no one of the elements which the Commission must consider is predominant. All must be considered *per se* and relatively. The "financial condition of the carriers" and the "cost of service" are not the only factors to be considered (*Beaumont S. L. & W. Ry.* vs. *United States*, 282 U. S. 74; *Brimstone R. & C. Co.* vs. *United States*, 276 U. S. 104).

"The rule or formula prescribing the divisions" lacks the requirement that "a sound basis" for it "is essential to compliance with the Act" (*Beaumont, S. L. & W. Ry. Co.* v. *U. S., supra*).

It is an elementary rule that the substance and not the shadow determines the validity of the exercise of the Commission's power (*I. C. C.* v. *Union Pac. R. R.*, 222 U. S. 541, 547). When this Honorable Court looks to the "substance" of all the factors which, under Section 15(6) the Commission is required to consider, and not the "shadow" of Southern lines' alleged "worse financial condition," the order must be set aside as an invalid exercise of the Commission's power.

V. The District Court erred in failing to find that the order of the Commission is arbitrary, illegal, and void, and in excess of its statutory powers, in that, while purporting to give "due consideration" to a "fair return" on railway property of the Southern lines, as required by Section 15(6) of the Interstate Commerce Act, it considered merely the rates of return of said Southern lines from the entire operations of such lines. In a case involving but a single commodity, the "due consideration" that must be given to "operating expenses, taxes, and a fair return" must necessarily relate to the "operating ex-

penses" incurred in the handling of the traffic, the "taxes" reasonably and fairly allocable to the traffic, and a "fair return" on such property as is devoted, or fairly attributable, to the transportation of the commodity—in this case citrus fruit (*New England Divisions Case*, 66 I. C. C. 196, 207; *Beaumont S. L. & W. Ry.* vs. *United States*, 282 U. S. 74, 89).

This contention does not run counter to the "financial need" doctrine of the *New England Divisions Case*, 261 U. S. 184, where the Commission's order was regarded by this court as a supplement to the order making a general 40 per cent increase in rates entered in *Ex Parte 74, Increased Rates, 1920*, 58, I. C. C. 220, 302, 489. In the instant case the rates for which divisions are prescribed are on a single commodity, and they were reduced by the Commission "quite largely in the light of evidence concerning improved conditions on the Florida lines which had arisen since the former rates were established."

The financial need principle may not properly be applied here, because the same average rates of return from the total business of the Southern carriers, relied upon as warranting the divisions prescribed in the order under attack, are likewise being relied upon in connection with divisions of rates on practically all other interterritorial traffic now before the Commission in its general investigation of interterritorial divisions between the South and the North, Docket No. 24160.

In *Beaumont S. L. & W. Ry.* vs. *United States*, *supra*, at page 87, this court said:

> "For aught that appears the carriers having little or no return on their total business may

move the traffic in question at low costs and realize a satisfactory percentage of profit on that part of their business."

This record shows that under the prescribed divisions Southern lines, based on the 1928-29 shipping season, will have available in the aggregate for return on investment the sum of $1,767,078.86 in excess of estimated expenses, plus car rental and taxes, equivalent to a 12.95 per cent. return.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE COMMISSION'S ORDER IS INVALID BECAUSE THE DIVISIONS PRESCRIBED FOR APPELLANTS ARE SO LOW FOR PARTICULAR HAULS, FOR INDIVIDUAL CARRIERS, AND FOR APPELLANT RAIL LINES IN THE AGGREGATE, THAT THEY FAIL TO COVER OPERATING EXPENSES AND TAXES REASONABLY AND FAIRLY ALLOCABLE TO THE TRAFFIC, IN CONTRAVENTION OF THE FIFTH AMENDMENT TO THE CONSTITUTION AND IN VIOLATION OF SECTION 15(6) OF THE INTERSTATE COMMERCE ACT (ASSIGNMENT OF ERRORS NOS. 1 TO 9, INCLUSIVE).

The confiscatory results of the divisions prescribed by the Commission may be shown at the outset by the following tables (Hodkinson Ex. Nos. 6, 6-A, and 10):

TABLE 1

17324 (A.C.L.—S.A.L.) Cars to Trunk Line Territory

North

Revenues under prescribed divisions	$ 1,247,237.52
Estimated expenses	1,300,707.31
Deficit	$ 53,469.79

South

Revenues under prescribed divisions	$ 4,702,160.98
Estimated expenses	2,935,082.12
Available for return on investment	$ 1,767,078.86
5¾% return (A.C.L.—S.A.L.)	784,404.10
Surplus over 5¾% return	$ 982,674.76

Subdivision of Revenues and Expenses North—17324 cars.

Carrier	*Revenues under Prescribed Divisions*	*Expenses*	*Deficit*
P. R. R.	$748,339.98	$813,918.88	$65,578.90
R. F. & P.	411,051.64	412,311.20	1,259.56
B. & O.	87,845.90	74,477.23	13,368.67*

* Surplus.

TABLE 2

4662 Cars Moving to Central Territory Destinations

Revenues under prescribed divisions	$285,064.02
Estimated expenses	232,456.87
Surplus	$ 52,607.15

21986 Cars to Trunk Line and Central Territories (Hodkinson Ex. No. C-7).

Revenues under prescribed divisions	$1,532,301.54
Estimated expenses	1,533,164.18
Deficit	$ 862.64

TABLE 3

The Aggregate Effect of the Order on the P. R. R. and B. & O. Individually.

P. R. R. Cars

Number of cars (Hodkinson Ex. C-17.)	15,782	
Total revenues (prescribed divisions)		$823,304.40
Estimated expenses		885,780.17
Deficit		$ 62,475.77

B. & O. Cars

Number of cars (Hodkinson Ex. C-16)	3,275	
Total revenues (prescribed divisions)		$128,957.82
Estimated expenses		111,146.41
Surplus		$ 17,811.41

The method employed to reveal this confiscation involves a use of appellants' respective system unit expenses per total car-mile * for handling all freight traffic, and the cost evidence epitomized above shows that the divisions prescribed by the Commission's order are so low for particular hauls, for individual carriers, and for appellant rail lines in the aggregate, that they fail to cover operating expenses and taxes reasonably and fairly allocable to the traffic. Appellants appreciate, however, that before such estimates of cost may be accepted as reliable it is incumbent upon them to establish, first, the soundness of the theory which underlies the studies; and second, that the particular system unit or units of cost which they have used is justified by the nature of the traffic involved. Finally, the studies themselves must emerge from the criticisms directed against them sufficiently unscathed to enable this court to make "a reasonable deduction" as to the cost of transporting citrus fruit over appellants' lines. The various considerations bearing on these matters will now be discussed.

A. The Theory upon Which Appellants' Cost Evidence Was Presented Is Sound.

The retroactive part of the Commission's order requires a readjustment of divisions on all shipments of citrus fruit from Florida to Trunk Line and New England destinations from November 22, 1930, to June 1, 1934, inclusive. During this period 85,904 cars of this traffic moved (Clark's Ex. C-6). By the time the Commission's decision was announced, however, the annual movement had materially fallen

* The nature of this expense unit is explained, *post*, p. 37.

off because of the activities of competing carriers by water (R. 1596-97), and a current keeping of accounts and statistics for a test period relating to the remaining small rail movement to the east would have been open to the objection that the circumstances and conditions surrounding it were entirely unlike those which surrounded the much heavier movement in the 1930-31, 1931-32, and 1932-33 seasons, even if we assume that some such study could have been made. For example in the 1933-34 season only 8836 cars moved (Clark's Ex. C-6). The record is definitely to the effect that a special study would have been impracticable (R. 1223, 1268, 1277, 1279). Appellants were faced with the practical problem of determining the approximate cost of handling traffic that had already moved. It so happened that the record before the Commission contained a revenue test based on the 1928-29 season's movement and comparisons showed that the 1929 cost statistics of the carriers concerned were typical of those over the five-year period 1929-33 (Hodkinson Exhibit No. 1-A). Since it was possible to determine from the revenue test for the 1928-29 shipping season the total car-miles expended by each Northern and Southern line in the handling of citrus fruit, both for particular hauls as well as in the aggregate, a reasonable approximation of such costs could be computed if the use of a system car-mile expense unit were justified by the facts. The use of the total car-mile expense unit, later described (*post*, p. 57), is amply justified by the supporting facts adduced, and the studies based thereon clearly establish the fact of confiscation.

The Commission itself recently recognized, in *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co., supra:*

> "* * * that it is impossible on a system like the defendant's engaged in the general transportation of all kinds of freight and of passengers, to determine accurately the exact cost of transporting any one commodity."

Moreover, in *Atlantic Coast Line Railroad Co.* vs. *Florida,* 203 U. S. 256, at page 260, this court said:

> "* * * We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed *it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile.* We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothing from which *a reasonable deduction can be made as to the cost of transportation,* the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income." (Italics supplied.)

Appellants believe that this is a case where "it is necessary to accept as a basis the average rate of all transportation" per total car-mile, not to prove "exact cost," but to enable "a reasonable deduction" to be made by this court "as to the cost of transportation" of citrus fruit handled by appellants.

It is, of course, well settled that on the issue of confiscation appellants are entitled to the independent judgment of the court as to both the law and the facts.

Ohio Valley Water Co. vs. *Ben Avon Borough,* 253 U. S. 287;
Bluefield Water Works & I. Co. vs. *Pub. Serv. Comm.,* 262 U. S. 679;
Ohio Utilities Co. vs. *P. U. Comm.,* 267 U. S. 359.

It is also settled that where the expenses and taxes apportionable to a service are greater than the revenues derived from that service, or only a nominal profit is returned, evidence of the value of the carriers' property used in the performance of that service is not required to establish the fact that the rate is confiscatory.

N. & W. Ry. Co. vs. *Conley,* 236 U. S. 605;
Banton vs. *Belt Line Ry. Co.,* 268 U. S. 413, 425;
N. P. Ry. Co. vs. *North Dakota,* 236 U. S. 585.

Assuming that ordinarily it would be unsound to use a system unit cost to approximate the cost of handling a particular commodity, appellants nevertheless believe that they have in this case overwhelmingly established the propriety of using system unit costs for reasons which will now be given. The first of these is found in the Commission's original report herein (R. 73), where the Commission, after reviewing the operating and other transportation conditions under which citrus fruit is handled, said:

"* * * The voluminous evidence descriptive of operating conditions cannot be translated into terms of costs for the purpose of comparing the two groups of roads in this respect. *In general, it indicates that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the*

ordinary run of freight, and that both the eastern and the southern carriers have equipped their plants and operating organization to this end." (Italics supplied.)

But in addition to this express finding by the Commission on the point, there is substantial evidence of traffic and operating experts, with years of experience, each of whom, after narrating the many special and expensive services which are performed in connection with the handling of citrus fruit and other perishable traffic that are not performed in connection with the average traffic, expressed his informed judgment in court that unquestionably the cost of handling citrus fruit exceeded that of the general run of traffic or average traffic.

The second reason upon which appellants rely in support of their use of system unit expenses is based upon what both the Commission and the appellee, Atlantic Coast Line, themselves did in another proceeding. In *Georgia Pub. Serv. Comm.* vs. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, the Commission considered a study submitted by the Atlantic Coast Line which purported to "approximate the cost of transporting logs on the basis of system average costs per unit, applied to the average carload, tare weight, empty haul, and average distance that class of traffic is hauled in Florida." At page 184 of its decision, the Commission said:

> "* * * Ordinarily it would be unsound to use a system unit cost to determine the cost in a particular State, but since it is indisputable that unit costs are higher in Florida than elsewhere on the system, it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost in Florida."

In line with this sound principle, appellants introduced evidence before the District Court as to operating conditions and transportation costs on those portions of their lines principally used in the handling of citrus fruit. They contend that if this record establishes that undoubtedly it costs more to handle citrus fruit traffic than the average of all freight, and in addition that unit costs on those portions of appellants' lines principally used in the handling of citrus fruit are higher than their respective system costs, then it must inevitably follow that the only remaining question would be as to the justification for the use of the particular system unit of cost selected, which in this case is the "total car-mile" basis.

The total car-mile expense unit is thus obtained: The total freight car miles, including both loaded and empty cars, and also the total operating expenses and railway taxes, were ascertained for each carrier from the statistical reports furnished by it to the Commission, and these costs were separated as between freight and passenger traffic in accordance with a formula prescribed by the Commission for such separation. Deductions from total freight expenses were made for freight train car repairs, depreciation, and retirements, since citrus fruit is moved in refrigerator cars, not owned by the carriers but rented at the rate of 2c per mile. Then the net freight expense was divided by the total freight car miles and a unit expense per car mile for all freight traffic was ascertained. To this was added 2 cents per car mile as rental for refrigerator cars. The resulting unit expense was then applied against the total car miles involved in the

movement of each of 17,324 cars to points in Trunk Line and New England territories and 4,662 cars to points in Central territory with the results already shown (*ante*, pp. 31-32).

Are the studies which produced these results reliable? The answer to this question largely depends upon whether the premises upon which they were based are justified by the facts of record. These premises are—

> (1) that the cost to appellants of transporting citrus fruit per unit of traffic is greater than the average cost of transporting all freight per unit of traffic on their respective systems;
>
> (2) that the principal portions of their respective system lines necessarily used by appellants in the transportation of citrus fruit are relatively more expensive to operate than their respective system lines; and
>
> (3) that the average total car-mile expense unit for all traffic furnishes a reasonable basis of approximating the cost to appellants of handling citrus fruit.

We shall accordingly review the expert operating and accounting evidence of record, which we insist justifies the premises upon which the studies are based.

B. The Cost to Appellants of Transporting Citrus Fruit Per Unit of Traffic, from Points Used in the Commission's Order as Gateways or Dividing Points for Determining Divisions to Destinations in Official Territory, Is More Than the Average Cost of Transporting All Freight Per Unit of Traffic on Their Respective Systems.

The expedited transportation, and the concomitant many special services performed by the appellants in the handling of citrus fruit north of the gateways with Southern lines, may be logically divided into two classes,—(a) line-haul service, and (b) terminal service. The onerous character of these services, as disclosed by the record, will now be briefly reviewed.

1. The Line-Haul Service Accorded Citrus Fruit Is Greater and More Expensive Than That of the Average of All Traffic.

a. *Elements of Service Which Make the Haulage of Citrus Fruit More Expensive Than All Traffic Generally.*

(1) The necessity of making delivery of citrus fruit and other perishables at destination terminals where market hours are observed places upon the carriers, particularly the destination carriers, a burden in respect of prompt delivery which greatly exceeds that incident to the delivery of all freight generally (R. 1278-79, 1345-46, 1351-53, 1371, 1378-79).

(2) Since the decision in *N. Y. & Norfolk R.R.* vs. *Peninsula Exchange,* 240 U. S. 34 (1916), the carriers have been held to a very high degree of liability for delay in making delivery of fresh fruits and vegetables in time for established market hours (R. 1351-52).

(3) Loss and damage claims on citrus fruit are greater than for the average of all traffic (R. 1268, 1281).

(4) Faster train schedules are maintained for citrus fruit and other perishables than for the average of all freight generally (R. 1278-79, 1317, 1338-40, 1349, 1365, 1366, 1371, 1375).

(5) Citrus fruit and other perishables customarily move in more lightly loaded trains (R. 1279, 1317, 1338, 1365, 1371, 1375, 1537, 1538; Clark Ex. No. C-5).

(6) Substantially less than the full potential capacity of the locomotives used is obtained in the case of trains carrying citrus fruit and other perishables (R. 1352, 1353, 1371, 1372, 1375, 1396, 1537, 1538; Clark Ex. No. C-2).

(7) Citrus fruit moves almost exclusively in refrigerator cars which are materially heavier than the average weight of all cars (R. 1353, 1362).

(8) The empty return movement of refrigerator cars is relatively greater than for the average of all cars (R. 1318, 1339, 1377, 1397).

(9) The return movement of empty refrigerator cars is more onerous than that of the average of all cars, because of their heavier weight, greater percentage of return empty movement, and the greater degree of expedition necessary in moving refrigerator cars to the producing territory (R. 1318, 1344).

(10) A greater tonnage of tare weight per ton of lading is transported in the case of citrus fruit and other perishables than in the case of all freight generally (R. 1397; Clark Ex. No. C-3).

(11) The fluctuations in the volume of daily shipments of citrus fruit and other perishables, as caused

by weather or market conditions, results in the necessity of the carriers providing and maintaining excessive power to handle traffic which may not materialize, and necessitates a relatively greater amount of light engine movement than is occasioned by all traffic generally (R. 1338-1340, 1348-49; Menaugh Ex. B).

b. *Special Line-Haul Services Rendered Citrus Fruit Traffic by Individual Official Roads.*

The record contains for *individual* Northern carriers composing the principal routes for citrus traffic north of the gateways a full exposition of the numerous *special* line-haul services performed by them in respect of the transportation of citrus fruit which make it a *more expensive traffic to handle than the average of all traffic.* This evidence, for convenient reference, has been summarized in Appendix B hereto.

2. The Terminal Service and Expense Incident to the Handling of Citrus Fruit Is Greater Than for the Average of All Traffic.

a. *Terminal Services Performed at Intermediate Terminals and Interchange Points.*

(1) The necessity for expediting citrus fruit and other perishables through intermediate terminals and interchange points necessitates the provision of many more car inspectors than would be necessary in the case of slow freight (R. 1279, 1317, 1338-39, 1345, 1346, 1365, 1366, 1372).

(2) It is necessary to provide more yard engines and crews to classify promptly cars of citrus fruit and other perishables, to move them to and from ice

house, to put them in or take them from "hold" tracks, and to make up into outbound trains for scheduled movement than in the case of other traffic generally (R. 1279, 1280, 1345-1347, 1365, 1366, 1372).

(3) Special facilities and forces are provided to make quick running repairs to cars of citrus fruit and other perishables moving on schedule for market delivery. This represents a greater service than in the case of all traffic on the average (R. 1345-47).

(4) Reconsignment and diversion are performed in the case of citrus and other perishables to a much greater extent than in the case of traffic on the average. These services are performed without charge at Potomac Yard, and diversions are quite generally free in Central territory. In addition there are certain relaxations at Harsimus Cove Yard, Jersey City, from the usual charges for these services in Trunk Line territory (R. 1278, 1346, 1347, 1354, 1355, 1372). Even where charges are made for these services the actual cost thereof to the carrier may be very substantially greater (R. 1278).

(5) There is a greater holding of citrus fruit and other perishables for reconsignment than in the case of all traffic generally. This represents a substantial service (R. 1346-48; Menaugh Ex. A).

(6) A greater amount of preclassification for destination is made at intermediate terminals in the case of citrus fruit and other perishables than in the case of all traffic generally. This is because of the necessity of quick movement or lack of facilities at the junctions or destinations to which consigned. This type of classification is regarded by operating officials as representing a greater service than would

otherwise be necessary (R. 1353, 1354, 1365, 1369, 1372).

(7) More records, and more detailed records, must be kept for citrus fruit and other perishables than in the case of all freight generally. These include special passing reports, records of position of ventilators of refrigerator cars, etc. (R. 1280, 1338).

b. *Destination Terminals.*

(1) More yard engines and yard crews are required and furnished to insure prompt classification, delivery and placement of citrus fruit and other perishables at perishable produce terminals (R. 1279, 1280, 1353, 1354, 1365, 1366, 1370, 1373).

(2) The "hold" privileges which are available at more important destination terminals are used to a greater extent by citrus fruit and other perishables than by all traffic generally. Such services are employed to a greater extent in Official territory than at intermediate points in the South (R. 1346-1348, 1353, 1354).

(3) A greater amount of switching service, both regular and extra, is performed per car of citrus fruit and other perishables than for the average of all freight (R. 1317, 1353, 1354, 1370, 1373).

(4) The perishable produce terminals which the Official lines have provided at all important cities of destination are much more expensive both in the initial investment and in the cost of operation than is the case with the terminals provided for all traffic on the average.

Initial investment. Some typical expenditures made by the Pennsylvania for perishable pro-

duce terminals during the years 1912-1930, as shown by Exhibit No. 210 before the Commission, are as follows:

New York, N. Y.	$1,771,000
Jersey City, N. J.	2,862,000
Kearny, N. J.	1,139,000
Philadelphia, Pa.	7,047,000
Pittsburgh, Pa.	6,071,000

The Detroit perishable terminal, owned in equal shares by the Pere Marquette, the Wabash, and the Pennsylvania represents an outlay of over $6,000,000 (R. 810). The perishable terminal provided at Boston by the New Haven represents an investment of approximately $1,200,000 for station facilities (R. 837), excluding tracks and adjacent yards (R. 1108).

By far the greatest portion of a carrier's business is *carload* traffic, of which the very great volume originates at and is destined to private sidings of shippers and receivers who themselves have the expense of maintaining such private facilities. Considering the volume of traffic and the amount of investments in freight terminals generally, the investment in produce terminals which are used for the delivery of citrus fruit and other perishables greatly exceeds on a per car basis the investment in terminals for all traffic on the average (R. 1280, 1366, 1377).

The Cost of Operating Perishable Produce Terminals Is Much Greater Than That of Operating Terminals for Other Traffic. The cost of operating the special perishable produce terminals which the Northern lines have provided at important points for citrus and other fruits and vegetables is undoubtedly substantially in excess of the terminal expense inci-

dent to the handling of the average of all traffic, and puts upon the delivering lines an unusually heavy burden (R. 1268, 1280, 1355). For example, detailed and carefully compiled terminal cost studies made by Witness Bonn for the Baltimore & Ohio produce terminal at Philadelphia, Pa., and similar studies made by Witness Heywood for the Pennsylvania's produce terminals at Pittsburgh, Pa., and New York, N. Y., disclose a *partial* expense of handling perishable freight at such terminals of $21.18, $16.05, and $29.60, per car, respectively.* These were respectively introduced before the Commission as Exhibits Nos. 229, 231 A, and 230 (R. 869-86, 1118-42).

The Chicago Produce Terminal is an important market for most perishable traffic. It is owned by the Santa Fe and Illinois Central Railroads. Other roads must pay and absorb the charges of the Produce Terminal for having their traffic delivered therein. These charges, according to the records before the Commission and this court, are $12.00 per car to the Pennsylvania, and to the Chesapeake & Ohio and the Chicago & Eastern Illinois the charges are $12.00

* These studies do not purport to cover the full terminal costs to the carriers of handling this traffic. Among other things they omit such items of cost as superintendence, stationery and printing, traffic expense, general expense, and other overhead items which would be appropriate to a complete study. Nothing was included for income taxes or any taxes other than property taxes. The studies also excluded costs for casualty expenses, small tools and supplies, water stations, fuel stations, freight train cars—repairs, work equipment repairs, and loss and damage—freight expense. Nothing was included for transportation of ties, rail, or other materials handled by the line making the study. These items, not included, would represent very substantial sums (R. 874,883).

The Florida lines made every effort to avoid the force of the showing of these studies, but without going into the details at this point, which would exceed appropriate limits, it is sufficient to say that the record amply sustains the figures produced by the studies. Such instances as were disclosed wherein different methods or more exact information would have shown lesser costs were substantially offset as to amount by the non-inclusion of other items, which might have been included considering the intended scope of the study. (R. 1084-1111, 1118-42, 1159-93.)

on cars destined to team, hold, inspection, or concentration tracks and $15.00 per car when destined to the auction house. A check made by the Chesapeake & Ohio disclosed that of the citrus moving into Chicago over its line 15 per cent was destined to points beyond, but that of the balance (85 per cent) 68 per cent was destined to the auction terminal for market and 32 per cent was destined to team, hold, inspection, or concentration tracks (R. 743, 773, 821, 1365, 1366, 1367).

At the Indianapolis Produce Terminal the cost to the New York Central Lines (C. C. C. & St. L. Ry.) of making delivery ranged from $13.93 per car during the period when perishables were moving in greatest volume, to $27.43 per car during a period of low traffic (R. 1280). These figures are exclusive of switching costs (R. 1278, 1280-84, 1292).

(5) Greater services are performed at destination terminals for citrus fruit and other perishables than for the average of all freight:

(a) Citrus fruit and other perishables are unloaded by the carrier without extra charge at New York and Philadelphia (R. 724, 1355).

(b) At important destinations special notice of impending arrival is given by telephone to receivers (R. 724, 1355, 1367).

(c) Special passing reports apprizing receivers of the location of citrus fruit and other perishables while en route are furnished by the carriers without charge (R. 656, 692, 722-24, 1355, 1367).

(d) At important perishable terminals special reports are given by the carriers to consignees such as of the location of their shipments in the terminal (R. 825, 826).

(e) Auction facilities are provided in the produce terminals maintained at the more important receiving points (R. 721-23, 824-26, 1355, 1373).

(f) The perishable terminals provided by the destination carriers also serve to an important extent as places for the sale (other than at auction) of the citrus fruit and other perishables there received (R. 693, 721).

(g) The expense of heating perishable terminals in winter weather is substantial. This is particularly applicable to the Florida citrus fruit traffic which moves in heaviest volume in the winter months (R. 693, 721, 1355).

(h) The carriers at their own expense maintain an inspection service at destination terminals to minimize loss and damage claims. (R. 725, 825, 1355).

(i) At perishable produce terminals where unloading is performed by the carriers, they are at considerable expense for recoopering broken packages and crates (R. 827, 1355).

(j) The policing of perishable produce terminals represents a substantial item of expense to the carriers (R. 826, 1355).

(6). The facilities and services provided by the carriers for and in connection with the delivery of citrus fruit and other perishables at the principal destinations at the time of the hearings before the Commission and at the present time were and are greatly in excess of the facilities and services which were provided when divisions were originally agreed upon of the rates prescribed in 1908 (R. 719-26, 824-27).

3. Transportation Experts with Years of Railroad Operating Experience Gave It As Their Informed Opinion and Judgment That Citrus Fruit Is More Expensive to Handle Than the Average of All Traffic.

In the light of the foregoing many special services performed by appellants in the handling of citrus fruit, transportation experts with years of railroad operating experience gave it as their informed opinion and judgment that citrus fruit is more expensive to handle than the average of all traffic. Portions of their expressions on the subject are reproduced below:

F. J. Fell, Vice President and Comptroller, Pennsylvania Railroad, 38 years railroad experience (R. 1267):

> "In my opinion the cost of handling citrus traffic would be greater than the average for all other traffic for the reason that the traffic is light loading, it requires other services such as moving into terminals where we have what we call our perishable terminals which have been constructed at very considerable cost, which cost more to operate than ordinary freight terminals. There is heavier loss and damage and the cleaning and other things that have to be done in connection with this traffic which are not required on the general average of other traffic" (R. 1268).

H. E. Coverston, Asst. to Vice President and General Manager of the Big Four Railway, New York Central Lines, 40 years railroad experience (R. 1277):

> "I would say the cost of handling citrus fruit over the Indianapolis and St. Louis divisions on

the Big Four, which are heavy divisions, is more expensive than the average of handling all freight" (R. 1278).

H. G. Barbour, Asst. General Manager of the Erie Railroad, Youngstown, Ohio (R. 1315):

"I am familiar with the service performed in connection with the handling of all traffic generally as well as with the service performed in the handling of citrus fruits and other perishable freight from Cincinnati, or Dayton, rather, to destinations on our line in C. F. A. territory. Speaking from my operating experience, the cost of handling commodities increases in proportion to the amount of service performed in connection with the handling of that particular commodity. The handling of citrus and other perishable freight is more expensive than the handling of the general run of traffic." (R. 1317).

W. A. Aiken, Jr., Superintendent of Transportation, R. F. & P. Railroad, 35 years operating experience (R. 1337):

"We feel very clearly that the handling of citrus fruit and other perishables by the R. F. & P. is more expensive due to the service required by that commodity. I make no distinction as between citrus and other perishables. Citrus gets the same service, generally speaking, as all other perishables." (R. 1340).

"In expressing my opinion that the cost of handling citrus fruit is greater than the ordinary run of traffic, I have not any figures with me. It is just the simple fact that I know we do a great deal more service for the citrus than for the other. I have no figures except I do know it requires more man power." (R. 1341).

N. S. Menaugh, Superintendent of Transportation, Eastern Region, Pennsylvania Railroad, 40 years railroad operating experience (R. 1343):

"In my opinion it is more expensive for the Pennsylvania to handle citrus fruit and other perishables from the south as it does handle them as compared with the average traffic generally on the system" (R. 1344).

A. F. McSweeney, Superintendent of Freight Transportation at Chicago, Western Region, Pennsylvania Railroad (R. 1364):

"In my opinion, the handling of citrus and other perishables by the Pennsylvania from the Cincinnati gateway to Chicago, Columbus, Pittsburgh and to other destinations in Central Territory or in connection with its handling of all citrus in that territory is more expensive per car unit than the cost of handling all traffic" (R. 1367-68).

Thomas J. Ward, District Supervisor of Terminals, Baltimore & Ohio Railroad (R. 1370):

"It is my opinion that it is more expensive to the Baltimore & Ohio to handle citrus fruit and other perishables from the Potomac Yard and Cincinnati gateways to the destinations to which it handles those commodities, than the cost of handling all freight on its lines" (R. 1372).

J. O. Bell, Superintendent of Transportation at Chicago of the Chicago & Eastern Illinois Railroad (R. 1374):

"I am familiar with the services performed in connection with the handling of all traffic gen-

erally, as well as with the handling of citrus fruit from Evansville to Chicago and other destinations on our line. Based on my operating knowledge and experience, my opinion is that the handling of citrus fruit and other perishables is more expensive than other traffic" (R. 1375).

J. E. Teal, Transportation Engineer, Chesapeake & Ohio Railway Co. (R. 1376):

"Based on my operating knowledge and experience, citrus fruit is the more expensive to handle as compared to the average of all traffic on the Chesapeake & Ohio Railroad" (R. 1377).

By the facts of record, and the considered opinions of transportation experts with years of experience, as above summarized, appellants have established that citrus fruit traffic is more expensive to handle than the average of all traffic, that the many special services accorded citrus fruit traffic make the line-haul service greater and more expensive than the average of all traffic, and finally, that the intermediate and destination terminal services incident to the handling of citrus fruit are unquestionably greater than for the average of all traffic.

We confidently assert that the foregoing facts establish—

(1) that citrus fruit is a perishable commodity moving in refrigerator cars and in its transportation requires the performance by appellants of many special services not performed in connection with the transportation and handling of the freight traffic generally;

(2) that the perishable nature of the commodity, its marketing requirements, and appellants' obligations in connection with its delivery, necessitate the performance by them of a specialized and expedited line-haul movement that is more burdensome, and undoubtedly more expensive, than the line-haul service performed in connection with the transportation and handling of freight traffic generally;

(3) that the same considerations which demand a specialized and expedited line-haul movement for citrus fruit to an even greater extent require expeditious and special intermediate and destination terminal handling that is more burdensome and undoubtedly more expensive than that incident to the delivery of all freight traffic generally;

(4) that the cost of providing and operating the special perishable produce terminals, which represent a heavy investment, and which are utilized by citrus fruit and other fruits and vegetables, is undoubtedly substantially in excess of the terminal expense incident to the handling of the general run of freight a great volume of which originates at, or is destined to, private sidings of shippers and receivers who themselves have the expense of maintaining such private facilities; and

(5) that the lower court erred in failing to find that the unit cost of handling citrus fruit was in excess of the average unit cost of handling all freight traffic.

C. The Principal Portions of Their Respective System Lines Necessarily Used by Appellants in the Transportation of Citrus Fruit from the Gateways or Dividing Points Used by the Commission for Determining Divisions to Destinations in Official Territory, Are Shown by the Evidence to be Relatively More Expensive to Operate Than Their Respective System Lines.

1. The Operating Expense Figures Show the Principal Citrus Routes of the Baltimore & Ohio and the Pennsylvania to be Relatively More Expensive to Operate Than Their Respective System Lines.

The record establishes (R. 255-56) that, during the 1928-29 test period, the bulk of the citrus fruit shipments transported by the Baltimore & Ohio and the Pennsylvania utilized those portions of the lines of these carriers extending from Potomac Yard, Va., to Baltimore, Philadelphia, and New York. Since it is incumbent upon these two appellants to justify the use of their respective system total car-mile expense units for all traffic, it is pertinent to inquire as to the relative cost of handling all traffic on these portions of their respective system lines. The table below, therefore, contrasts the net operating expense per total freight car mile for the Baltimore Division of the Baltimore & Ohio with the similar system unit, and for the Pennsylvania's Eastern Region and New York zone combined with that carrier's system unit:

Comparison of Expenses Per Total Freight Car Mile for 1929

Baltimore & Ohio System	*Baltimore Division* (B. & O.)*	*Pennsylvania System*	*Eastern Region —New York Zone† (P. R. R.)*
10.56 cents	14.61 cents	10.95 cents	11.59 cents

Authority: Bonn's Ex. No. B-1; Clark's Ex. No. C-1.

* The Baltimore Division of the Baltimore & Ohio extends from Brunswick, Md., through Washington, D. C., and Baltimore to Park Junction (Philadelphia) (Bonn's Ex. No. B-1).

† The combined Eastern Region and New York Zone (P. R. R. portion) of the Pennsylvania embraces system lines east of Altoona, Pa., and Renovo, Pa., except the Long Island Railroad (Clark Ex. No. C-1).

Inasmuch as practically all Baltimore & Ohio shipments moved to Baltimore and Philadelphia and since the lines of the Pennsylvania from Potomac Yard to Baltimore, Philadelphia, Jersey City, New York, Harrisburg, and Altoona lie within the combined Eastern Region and New York Zone (P. R. R. portion), these *actual expense* figures furnish incontrovertible evidence that the costs of operating their principal citrus carrying routes in this territory, including their lines from Potomac Yard to Baltimore and Philadelphia and to Jersey City and New York, are not less, but on the contrary are greater, than the expense of operating their respective system lines generally. In addition, Witness Clark made a check of the transportation costs per car-mile for those divisions of the Pennsylvania which more particularly lie along the route of movement from Potomac Yard through Baltimore and Philadelphia to New York. The expenses per total car-mile so disclosed for the *net transportation* expenses alone was 14.2* cents as compared with expense of 11.59 cents per total car-mile for the Eastern Region and New York Zone (P. R. R. portion) combined, which includes *all operating expenses* (R. 1539).

2. Testimony of the Responsible and Experienced Operating Officials of Northern Lines Establishes That Their Principal Routes for Citrus Traffic Are Relatively More Expensive to Operate Than Their Respective System Lines.

Experienced operating officials of Northern roads testified in detail as to the physical characteristics of, and the operating conditions on, the more important

* Net transportation expenses are included in, but are less than, all operating expenses.

routes used for the transportation of citrus fruit north of the gateways, which make such routes relatively more expensive to operate than their respective system lines. This testimony covered the principal routes from Potomac Yard to Baltimore, Harrisburg, Philadelphia, New York, and Boston, from Cincinnati to Columbus, Pittsburgh, Buffalo, Toledo, and Chicago, and from Evansville, Ind., to Chicago.

It demonstrates that their north-and-south routes which are principally employed for the movement of citrus fruit north of the gateways are subject to physical characteristics and operating conditions—such as limitations on size of locomotives which may be operated over bridges, such as delays in movement due to interference of drawbridges, block signal restrictions at tunnels, and of passenger trains, and such as adverse grades and their effect on train loading and speeds—which impose upon them a relatively more onerous and expensive operation in respect *of all traffic over such routes* than for all traffic over their respective system lines generally.

For convenience, this testimony has been epitomized by the more important routes for citrus fruit traffic, and appears in Appendix C to this brief.

D. For Light-Loading Traffic, Such As Citrus Fruit, Requiring Expedited Transportation and Many Special Services, the Average Total Car Mile Expense Unit for All Traffic Furnishes a Reasonable Basis of Approximating the Cost of Handling Citrus Fruit, Although Less Than the Actual Cost to Appellants.

In the cost studies submitted by appellants in this case they have used the average total car-mile expense unit as the fairest and most reliable unit available in view of the nature of the traffic involved. The use of this unit assumes that the total average expense per mile of hauling and handling a *car* of citrus fruit and returning it empty is at least as great as the expense per mile of hauling and handling the average car of freight on the same railroad, including the return of the empty. Thus the *car* is the unit that is used to estimate cost.

While the Southern carriers did not endorse any system unit as a basis for approximating the expense of handling citrus, they offered certain computations employing the system average gross ton-mile expense, which they stated would produce more dependable results than the total car-mile basis (Kennedy Exhibits 1 and 2; R. 1462). The use of the gross ton-mile unit assumes that the expense per mile of hauling and handling a *ton* of citrus fruit and car, including the return empty movement, is at least as great as the expense on the same railroad of hauling and handling the average ton of all freight and cars used in its transportation, including the return empty movement of such cars. Thus, the *ton* is the unit employed under this basis to estimate cost.

In considering the relative merits of the total car-mile and gross ton-mile expense units for approximating the cost of handling citrus fruit it is significant to note at the outset the fact that, while numerous experienced operating officials of Northern lines testified that the actual methods of operation incident to the transportation of citrus fruit made the car-mile unit more suitable and more reliable than the gross ton-mile unit, *not one operating official of a Southern line expressed a contrary opinion.* The only strictures upon the car-mile unit were by *accounting* officers of Southern lines. One of these used a similar unit for a confiscation study before the Commission and a United States District Court (R. 1216), and both he and another recognized that even the car-mile unit would tend to understate the expense of handling citrus fruit when the average haul on citrus fruit was less than the average haul on all traffic (R. 1429, 1463), and further that because of its relatively light loading the gross ton-mile basis would understate the expense of handling citrus fruit for either the Eastern or the Southern lines (R. 1418).

The experience gained in years of operating their respective lines of railroad makes particularly cogent the unanimous testimony of the responsible operating officers of Northern lines that the quantum of service and expense incident to the transportation of citrus fruit is greater per unit of traffic than for the average of all traffic, and that the use of the total car-mile expense unit furnishes a reasonable basis of approximating the cost of handling citrus fruit. For example, Witness H. E. Coverston, Assistant to Vice President and General Manager of the Big

Four Railroad, New York Central Lines, a man of 40 years railroad experience testified:

> "In view of the fact that there is no known method of accurately apportioning total freight operating expenses to a specific traffic, it is necessary to estimate the average costs, and the method followed of determining the average costs on basis of dividing the operating expenses and taxes chargeable to the handling of freight traffic by total freight car miles as used in the Hodkinson exhibit is not only equitable in my opinion but is reasonably indicative of the trend, and as this method is used for both the southern and northern lines, it produces results that are comparable, particularly so in view of the fact that it undoubtedly understates the cost of handling citrus fruits" (R. 1277-78).

His testimony was corroborated by experienced operating and transportation officials of the Pennsylvania, Baltimore & Ohio, R. F. & P., and the Chesapeake & Ohio railroads, all of whom were unanimous in their support of the total car-mile unit as a reasonable basis of approximating the cost of handling citrus fruit. Among other reasons which they advanced were the light-loading of citrus fruit, the expeditious handling of that traffic, the fact that in the operation of a railroad the car is the unit, etc. For convenience, the separate expressions of these experienced officials on this subject have been reproduced in Appendix D to this brief.

An experienced transportation engineer testified that it requires approximately the same, or a greater amount of, energy to move a carload of lightly-loaded traffic at high speed as a car of heavily-loaded traffic at slow speed (R. 1381-82); that transporta-

tion expenses (superintendence and dispatching of trains, station employees, signals, clearing wrecks, loss and damage, etc.) are more properly distributed on a per car basis than on a tonnage basis (R. 1382-33); and that maintenance of way and maintenance of equipment expenses are likewise more accurately distributed on a per car basis than on a tonnage basis (R. 1382-83).

In addition to the testimony of the operating and transportation experts summarized in Appendix D, Witness Hodkinson, the statistician who presented the cost studies, testified that some of the reasons supporting the use of the total car-mile basis were the facts that citrus fruit is both actually and relatively a light-loading commodity; that as to such light-loading commodities carriers are concerned with their revenue *per car* and not per ton, since ton-mile statistics do not reflect car loading; and that a large portion of the service performed in handling citrus fruit is intermediate or destination terminal service where the *car* is the unit handled (R. 1226).

It is significant that no specific, concrete or understandable reasons against the use of the total car-mile expense unit were presented by witnesses for the Southern lines. On the other hand one of the three accounting witnesses of the Southern lines mentioned the light loading of citrus fruit as one important reason why the gross ton-mile basis would be "too low as applied to citrus fruit" and that:

> "* * * the gross ton-mile basis does not truly reflect either for the Southern lines or for the Eastern lines, on the system average, the cost of handling the traffic" (R. 1418).

There can be no doubt that the use of the gross ton-mile unit would understate the cost of transporting citrus fruit, and that considering the more expensive service performed for citrus fruit than for the general run of freight, and the more expensive operation of appellants' principal citrus-carrying routes than of their respective system lines generally, the use of the total car-mile expense basis does not overstate Northern lines' costs of handling the citrus traffic.

If a carrier's traffic consisted only of high-grade traffic such as perishables equally expensive to handle as citrus fruit, then unquestionably the system average cost per car mile would be approximately the cost of handling any car of one commodity one mile. But if a carrier's traffic consists of both high-grade and low-grade traffic, the latter being less expensive to handle than the former, then the system average cost is depressed to the extent of the proportion of low-grade freight, and such a system average cost would understate the actual expense of handling the high-grade or perishable freight. The soundness of these conclusions is self-evident.

In a normal year the R. F. & P.'s citrus and other perishable traffic will equal the number of cars of all other traffic (R. 1342). All its perishable traffic gets "identical service" (R. 1340). In the light of the many special services given perishable traffic as compared with other non-perishable traffic the Superintendent of Transportation of the R. F. & P.—a man of 35 years' railroad operating experience—gave it as his informed judgment that the cost of handling citrus and other perishables was higher than for the remainder of all freight handled by the

R. F. & P. (R. 1340). This testimony stands uncontradicted of record. Obviously, if the cost of handling perishables (50 per cent of the R. F. & P.'s traffic) is more than the remaining 50 per cent (all other freight), it is entirely fair to use the average total car-mile cost of the R. F. & P. on all its traffic to determine a cost which must necessarily be somewhat less than the total car-mile cost of handling citrus fruit. A similar conclusion necessarily follows in the case of other carriers whose proportion of "dead freight" handled at slow, economical speeds is even greater than that of the R. F. & P.

The system total car-mile units used were those for the respective lines for the year 1929—a year used by the Commission and the Southern lines as typical throughout this proceeding. These units were applied to shipments moving during the 1928-29 season, a movement likewise used as typical. In addition this record shows that *for the 5-year period 1928-32, inclusive, the average system unit total car-mile costs of the various carriers approximated those for the year 1929* (Hodkinson Exhibit No. 1-A). It is, therefore, clear that calculations based on 1929 unit costs and applied to 1929 traffic may be properly used for ascertaining the probable effect of the Commission's order in subsequent years. *Smyth* v. *Ames*, 169 U. S. 466, 528.

The record establishes that the average system total car-mile expense units for all traffic of the respective Northern lines for the year 1929 furnish a reasonable basis for approximating a cost which is *less* than the cost of handling citrus fruit, and that the use of such a unit is more than fair to the Southern lines.

E. Using Statistics for the Year 1929, and Allocating Expenses to Citrus Fruit Traffic on Basis of Their Respective System Total Freight Car Mile Units, Appellants' Costs and Expenses Reasonably Chargeable to the Transportation of Citrus Fruit Handled by Them, Together with an Allowance for Taxes Fairly Attributable to That Service, Plus Car Rental, Exceed for Particular Hauls, for Individual Carriers, and for Appellants in the Aggregate, the Revenues That Would Be Received By Them and Each of Them under the Prescribed Divisions.

Up to this point we have demonstrated—

(a) that the theory upon which appellants' cost evidence was presented is sound;

(b) that it costs appellants more to transport citrus fruit per unit of traffic than the average cost of handling all freight per unit of traffic;

(c) that the principal portions of appellants' lines necessarily used in the transportation of citrus fruit are relatively more expensive to operate than their respective system lines as a whole; and

(d) that for light-loading traffic, such as citrus fruit, requiring a specialized and expedited service, the average total car mile expense unit for all traffic furnishes a reasonable and proper basis for approximating the cost of handling citrus fruit.

Because of their relationship to the subject discussed in an ensuing chapter (*post*, p. 93), the reasons given by the lower court for rejecting appellants'

studies, which are based on system total car mile units, will be reserved for discussion at that time. At this point we shall refer to the results of the studies (*ante*, p. 31), considering at the same time the criticisms that were advanced by the Commission in another case, and likewise by defendants here, against a somewhat similar study which used the total car mile expense unit. The case referred to is *Burch* vs. *Railway Express Agency*, 190 I. C. C. 520; 197 I. C. C. 85; *Railway Express Agency* vs. *U. S.*, 6 Fed. Supp. 249.

The three principal criticisms of the total car mile basis made by the Commission in *Burch* vs. *Railway Express Agency*, 190 I. C. C. 520, were stated at pages 534 and 535, as follows:

> "1. * * * that there is no separation of line-haul and terminal costs, the amount of each being reduced to an average per passenger-train car-mile, thus including the terminal as well as the line-haul factor in the average car-mile cost. A terminal factor is a constant, independent of and unaffected by the distance a car is handled, whereas a line-haul factor is so affected and therefore a variable quantity. The effect of including both factors in the average car-mile cost and applying the latter to hauls of various distances is to make equally variable and thus pyramid the terminal factor. This is conspicuously true here, where the combined loaded and and empty movements embraced by the study range from 2,170 to 3,374 miles. The evident result is an excessive estimate of these costs, in an undeterminable degree, including those of intermediate carriers in the through movements which perform no terminal service at all.

"2. The study also questionably assumes that it costs as much to haul an empty car as a loaded one * * *."

"3. * * * and that system car-mile cost is representative of the cost on the main lines of heavy-density, or relatively heavy density, traffic over which this strawberry traffic principally moves."

These criticisms will be discussed in the order in which they have been stated, but it should be noted in passing that no objection was made to the total car-mile expense *as a unit* except to the extent that the second criticism bears on this question.

The criticism that there is no separation between line haul and terminal costs is, of course, part and parcel of the contention that pyramiding of the terminal factor results. The criticism is warranted when the average hauls to which the total car-mile expense factors are applied are *substantially longer* than the average hauls on all traffic; but, as appellants' witnesses pointed out during the hearings, the criticism loses its force and does not apply when the average hauls to which the unit costs are applied closely approach the average hauls on all traffic. To illustrate: In the *Burch Case, supra,* the combined loaded and empty movements embraced by the study ranged from 2,170 to 2,374 miles. In the instant case, however, Hodkinson's Exhibit No. C-15 shows that the average loaded haul on citrus traffic for the Pennsylvania Railroad in the year 1929, based on the movement of 18,411 cars was 220.75 miles, which is but slightly more than its average haul on *all* traffic of 210.17 miles. The average haul of the Baltimore & Ohio on citrus fruit, based on 3,009 cars moving in the 1928-29 season, was 112.81 miles, which is substantially *less* than the average haul on all traffic of over 190 miles. Petitioners also showed that consid-

ering the movement of 21,986 cars to Trunk Line and Central territories the actual average haul on citrus fruit for the lines over which these cars moved was less than 200 miles, if the 110-mile haul of the R. F. & P. on over 17,000 of these cars is taken into account.

In the course of his testimony Witness Lamb of the Southern lines, by combining the loaded and empty movements of citrus fruit, developed that for the Pennsylvania the average loaded and empty haul on citrus fruit was about 28 per cent higher than the system average loaded and empty haul on all traffic. From these facts he drew the conclusion that pyramiding of the terminal factor resulted (R. 1429-30).

We reiterate that where the average hauls on citrus fruit so closely approximate the average hauls on all traffic there is no occasion for making a separation between line haul and terminal, because there is no pyramiding. In this connection attention is invited to the following admission made by the attorney for appellee Southern lines in response to inquiry from the bench (R. 1215-16):

> "Judge Soper: If the average haul of the citrus traffic approximates the average haul of all traffic is there any pyramiding of terminal costs?
>
> "Mr. Gwathmey: Our accountant has the figures. It is my understanding they are not approximately the average. We will undertake to prove to your Honors that they are not approximately the same.
>
> "Judge Soper: If they were, would there be pyramiding?
>
> "Mr. Gwathmey: I think they would not under those conditions."

It so happens that there are included in the Hodkinson studies examples which demonstrate conclusively that, so far as the application of the total car-mile costs of the Northern lines is concerned, there is very little, if any, pyramiding of the terminal factor. We shall now undertake to demonstrate mathematically just what this criticism as to pyramiding means as applied to an actual movement. At page 5 of Hodkinson's Exhibit No. 3-A the cost of handling a carload of citrus fruit from Richmond, Va., to Phillipsburg, N. J., is shown. It happens that Phillipsburg, N. J., is 209 miles from Potomac Yard, which is one mile less than the Pennsylvania's average haul on all traffic of 210 miles. The aggregate expense per car for the haul from Richmond to Phillipsburg is there shown as $76.84, divided $53.04 for the Pennsylvania's haul of 209 miles north of Potomac Yard and $23.80 for the 110 mile haul of the R. F. & P. from Richmond to Potomac Yard. The Pennsylvania's costs for this haul were as follows:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Potomac Yard via P. R. R. to Phillipsburg, N. J.

	P. R. R.
Expense loaded haul (209 miles x 10.95445 cents)	$22.89
Expense empty haul (186 miles x 10.95445 cents)	20.38
Rental refrigerator car	7.90
Taxes	3.59
Total estimated cost	$54.76
Less ice haulage cost	1.72
Net cost	$53.04

Note. The foregoing table is reproduced from page 5 of Hodkinson's Exhibit No. 3-A. The loaded and empty haul costs are determined by using the actual loaded and empty hauls on citrus fruit moving to Phillipsburg, N. J., and multiplying by the system unit expense per car mile.

The loaded haul on citrus fruit in the above table is 1 mile less than the Pennsylvania's average loaded haul on all traffic, but the empty haul on citrus fruit is 186 miles while on all traffic it is but 58 per cent of the loaded movement, or 122 miles. In the next table, therefore, we have assumed the same ratio of empty to loaded movement for citrus fruit as in the case of *all traffic*. The table follows:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Potomac Yard via P. R. R. to Phillipsburg, N. J., but Charging Against Citrus Fruit Only the Same Empty Return Movement as on All Traffic.

	P. R. R.
Expense loaded haul (209 miles x 10.95445)	$22.89*
Expense empty haul (121 miles x 10.95445)	13.25
Rental refrigerator car	7.90*
Taxes	3.59*
Total estimated cost	$47.63
Less ice haulage cost	1.72*
Net cost	$45.91

* From page 5, Hodkinson Exhibit No. 3-A.

The above estimated cost can not possibly be criticized on the ground that there is a pyramiding of the terminal factor because the loaded and empty hauls used for citrus fruit are in each instance 1 mile *less* than the loaded and empty hauls on all traffic, as is shown below:

	Average Haul P. R. R.	
	Loaded (miles)	Empty (miles)
All traffic	210	122
Citrus fruit to Phillipsburg	209	121

In other words, the $45.91 cost above computed necessarily understates the cost of handling citrus fruit because the P. R. R. actually returned the empty car 186 miles instead of the 121 miles for which charge is made.

From the foregoing tables it may be easily computed that the difference between the allocated cost in the Hodkinson study, $53.04, and a cost determined by using as typical a loaded and empty haul substantially identical with that of all traffic, viz., $45.91, is $7.13. In other words, *if there is any pyramiding of the terminal factor it is bound to be included in this $7.13,* which is the sum that is included in the Hodkinson study for the additional empty haul of 65 miles on the citrus car over and above the empty haul on all traffic (186 miles in the first table minus 121 miles in the second). According to Witness Lamb of the Southern lines, about 36 per cent of the Pennsylvania's total freight expense is chargeable to terminals (R. 1430). Accepting this figure there would remain 64 per cent of $7.13 as representing the cost of the line haul. This percentage of $7.13 is $4.56, which is the amount, according to Witness Lamb's testimony, that would be properly chargeable for the 65 miles additional empty return haul on citrus over and above the empty haul on all traffic as just indicated. If this amount is added to the $45.91 net cost shown in the second table heretofore reproduced, *an aggregate cost of $50.47 results.* By turning to page 1 of Hodkinson Exhibit No. 10, it will be seen that the *revenue* which accrues to the Pennsylvania Railroad on a shipment to Phillipsburg under the divisions prescribed by the Commission is *$49.97.* In other words, here we have a cost determined by using substantially the same loaded and empty haul as is performed in connection with all traffic, except that $4.56 is added to cover the line haul cost alone of hauling an empty refrigerator car

65 miles, yet the *aggregate cost, with no allowance for profit or interest on investment, exceeds the revenue* received by the Pennsylvania.

Let us take New York as an example, a destination as to which the Commission's attorneys in their brief in the lower court discoursed at length on the subject of the pyramiding of the terminal factor. The average per car expense charged in the Hodkinson study on 4,849 A. C. L. cars from Potomac Yard to New York is $59.88 for a loaded haul of 236 miles and an empty haul of 210 miles (See Hodkinson Exhibit No. 3-A, page 5). If in computing costs we allocate to these New York cars merely the $45.91 just shown for an average loaded and assumed empty haul on citrus fruit *the same as on all traffic*, we find that the Hodkinson studies include for the additional 27 miles of loaded haul to New York and the additional 89 miles of empty haul from New York the difference between $59.88 and $45.91, or $13.97. In other words, here again if there is any pyramiding of the terminal factor it must be included in the $13.97, which, of course, also must cover the cost of the service for the additional 27 miles of loaded and 89 miles of empty haul previously referred to. Again taking Witness Lamb's 36 per cent of this excess of $13.97 as properly chargeable to terminal, the balance of $8.94 would remain to cover the 27 miles of loaded haul and 89 miles of empty haul over and above the average loaded and empty haul on all traffic, making *a total expense of* $45.91 plus $8.94, or *$54.85.* Turning to page 2 of Exhibit No. 10 we find that on the 4,849 Atlantic Coast Line cars which moved to New York the Pennsylvania's *revenue* under the divisions prescrib-

ed by the Commission amounted to $265,138.79, or an average of *$54.68* per car. Here again we see that on a basis of cost which avoids any possibility of pyramiding the terminal *the aggregate cost, with no allowance for return on investment exceeds the revenue.*

Let us now turn to the portion of the service performed by the R. F. & P., which on every car handled was 110 miles loaded, and 99 miles empty, haul. The expenses allocated to the citrus traffic in the Hodkinson study were:

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Richmond, Va., via R. F. & P. to Potomac Yard.

	R. F. & P.
Expense loaded haul (110 miles x 9.05994 cents)	$ 9.97
Expense empty haul (99 miles x 9.05994 cents)	8.97
Total operating expenses	$18.94
Car rental	4.18
Taxes	1.59
Total estimated cost	$24.71
Less cost ice haulage	.91
Net cost to R. F. & P.	$23.80

Authority: Hodkinson Exhibit No. 3-A, page 5.

The mere statement of the foregoing costs should be sufficient to show that they are very conservative. The $9.97 allocated as cost of hauling a loaded car 110 miles under conditions outlined by Witness Aiken, Superintendent of Transportation of the R. F. & P., is little more than a usual charge for switching. In the case of the R. F. & P. there can not possibly be any material pyramiding of terminal costs, because 75 per cent of all the R. F. & P.'s traffic is "overhead" or "bridge" traffic. This is convinc-

ingly shown in Hodkinson's Exhibit No. 8 and his testimony in connection therewith (R. 1291-93).

In the table below, however, we have computed a cost for the R. F. & P. on the assumption that each car of citrus traffic is hauled loaded for only the same distance as the average of all traffic, viz., 97 miles, and also that the empty haul of the R. F. & P. on citrus traffic is 69 per cent of the loaded, as shown by Mr. Lamb for all traffic, instead of 90 per cent as testified to by Witness Aiken.

Table Showing Estimated Expense for Handling a Car of Citrus Fruit from Richmond, Va., via R. F. & P. to Potomac Yard, but Assuming that the Car Is Handled for Exactly the Same Distances as in the Case of All Traffic.

	R. F. & P.
Expense loaded haul (97 miles x 9.05994 cents)	$ 8.78
Expense empty haul (67 miles x 9.05994 cents)	6.07
Car rental	4.18
Taxes	1.59
	$20.62
Less cost ice haulage	.91
Net cost	$19.71

The revenue that would be received by the R. F. & P. under the prescribed divisions on the car to Phillipsburg, N. J., to use the same illustration as in the case of the Pennsylvania, is $21.48 per car (page 1, Hodkinson Ex. No. 10), while on the 4,849 cars to New York the average revenue per car was about $21.40 per car (page 2, Ex. 10). In other words, if we utterly ignore the fact that the R. F. & P. performed 13 miles more of loaded haul and 30 miles more of empty haul than in the above computations which are based on the average loaded and empty

hauls on all traffic, the R. F. & P.'s surplus over operating expenses and taxes would be the nominal amounts of $1.77 and $1.69 per car on the Phillipsburg and New York cars respectively.

In the light of the foregoing analysis there can not possibly be any reasonable doubt that the criticism as to pyramiding is not justified. As a matter of fact, on traffic moving for distances *less* than the average haul on all traffic, the estimated cost is bound to be *understated.* It will be recalled that Witness Kennedy, of the Southern lines, admitted on cross-examination that in the case of the Baltimore & Ohio, because of the short average haul on citrus fruit, *both the gross ton mile and the total car mile average unit expense as applied to the Baltimore & Ohio citrus traffic would have a tendency to understate the costs of handling its citrus fruit traffic* (R. 1463). Witness Lamb, of the Southern lines, made the same admission (R. 1430).

In the course of its opinion (R. 255), the court below, under the heading "Evidence Offered by the Defendants," stated:

> "* * * Pyramiding of terminal costs is illustrated in the application of the car mile unit cost to the movement of citrus fruit on the Pennsylvania in this year. The system average haul for the loaded and empty movement combined was 332 miles; while the average movement of citrus fruit was 416 miles, or an increase of more than 20%, involving an overstatement of terminal costs in the cost studies of this railroad. The freight expenses of the Pennsylvania, allocable to yards and terminals in 1929, amounted to $128,006,991, and when 20% of this figure is divided by the total car miles on the system, (2,-

741,963,000) there results the sum of .93c per car miles, by which the terminal costs have been overestimated. This figure, applied to the total Pennsylvania citrus fruit car miles in trunkline territory in the 1928-1929 season, (6,006,282), shows an overstatement of $55,858.42 in the aggregate cost as computed by the Pennsylvania for that territory" (R. 255).

We have already demonstrated by the use of hauls on citrus fruit identical with the hauls on all traffic, that there cannot possibly be any pyramiding of terminal costs. That there would be no pyramiding of the terminal costs when average hauls were the same was admitted by counsel for Southern lines (*ante,* p. 66). Assuming, however, that there is an overstatement of $55,855.42 in the aggregate cost as computed by the Pennsylvania, as stated by the court in the above quotation, the *aggregate cost of the cars handled by the Pennsylvania would still exceed the revenues from the prescribed divisions by the sum of $6,617.35.* It will be recalled that on the 15,782 cars included in the Pennsylvania study the total deficiency amounted to $62,475.77 (Hodkinson Ex. No. C-17).

Now as to the *second criticism* of the Commission, namely, that it questionably assumes that it costs as much to haul an empty car as a loaded one, the fact is that the total car mile expense unit includes the expense of performing all loaded as well as all empty car miles. If, therefore, it be assumed that it costs less to handle an empty than a loaded car, the obvious effect of applying this unit figure to both the loaded and empty hauls of citrus fruit is to understate the expense of the loaded haul and overstate

the expense of the empty haul. However, any overstatement of the cost in one case is substantially balanced by the understatement in the other (R. 1231-32). It by no means follows, however, that the expense of handling an empty refrigerator car in expedited service is any less than the system average cost of handling all cars loaded and empty. Witness Menaugh, Superintendent of Transportation of the Pennsylvania Railroad, testified that the Pennsylvania moves southbound empty refrigerator cars with practically the same dispatch in the terminals and over the road as when loaded northbound (R. 1344), and that generally he would say that the average cost for handling an empty car is as great as the average cost of handling a loaded car (R. 1358). In addition, Witness Teal, Transportation Engineer of the Chesapeake & Ohio, testified that because of the difference in rolling friction between loaded and empty cars, tests which had been made on the C. & O. show that it requires about double the amount of fuel to move a gross ton of empty coal car gross ton one mile as a gross ton of loaded coal car one mile (R. 1386). He further testified that in the case of one light loaded car in the same train with a heavily loaded car moving between the same points the difference in cost between the two cars would be infinitesimal (R. 1386). Taking two trains between the same points, one having 100 cars of heavy-loaded or tonnage freight such as coal, ore, etc., and one having 100 cars of light-loaded merchandise cars requiring quick dispatch, Mr. Teal testified that the heavily loaded train will be operated at a slow, economical speed requiring a minimum amount of fuel and water per car mile, while the fast train will be operated

at maximum speeds. This fact alone will increase the fuel consumption per car mile equal to or in excess of the heavy-loaded cars (R. 1387).

In the light of the testimony of these transportation experts it seems clear that the expense of handling an empty refrigerator car at high speeds is very little, if any, less than the per car-mile expense of handling all traffic, including dead freight, moving at economical speeds. But if there is some overstatement of cost as to empty hauls, it is wholly offset by the corresponding understatement on the greater volume of loaded hauls and by the greater unit cost of handling citrus than of all traffic.

As to the third criticism of the Commission, namely, that the study assumes that system car-mile cost is representative of the cost on main lines of heavy density, it need only be pointed out that no such assumption is made in this case. On the contrary appellants have here *demonstrated,* both by statistics of operation and by testimony of operating experts, that the unit car-mile costs on the portions of their lines principally used in the handling of citrus fruit, are *higher* than the system unit costs (*ante,* p. 54). *This testimony stands undisputed of record.* It does not seem necessary to recapitulate the many special and extraordinary services performed by appellants in connection with citrus fruit traffic (*ante,* pp. 40 to 53). It is sufficient to say that this testimony, by experienced operating officials, unquestionably proves that the cost of handling traffic over the lines principally used in the handling of citrus fruit, is greater than the similar expense for the system as a whole.

Having justified the premises upon which appellants' studies rest, and having demonstrated that cer-

tain criticisms of similar studies heretofore advanced by the Commission are not applicable in the instant proceeding, we turn now to the studies themselves.

In the 1928-29 shipping season, 27,048 cars moved via the Richmond gateway to destinations in Trunk Line and New England territories (R. 54). In order to establish the fact of confiscation, costs were computed on 14,573 cars moving over the Pennsylvania and 2,751 cars moving over the Baltimore & Ohio, an aggregate for the two roads of 17,324 cars. These were all the cars delivered to Northern lines at the Richmond gateway destined to points located on either the Pennsylvania or Baltimore & Ohio. The Richmond, Fredericksburg & Potomac Railroad transported each of the 17,324 cars from Richmond to Potomac Yard, Va. We have already shown the method used in determining the cost of transportation to individual destinations. A similar method was followed as to each of the 17,324 cars. As to each car operating expenses and taxes were allocated to the citrus fruit traffic and then such expenses were compared with the revenues that would accrue under the prescribed divisions. The result of the studies has already been shown by the tables (*ante,* pp. 31-32).

In those tables there is shown the revenue effect on individual lines in the north as to the 17,324 cars that originated on the Atlantic Coast Line and Seaboard Air Line and were delivered by the Pennsylvania or Baltimore & Ohio, the R. F. & P. being an intermediate carrier in each case. Table 1, for example, shows that *appellants' aggregate deficit* on these 17,324 cars delivered by either the Baltimore & Ohio or Pennsylvania amounted to *$53,469.79,* while

applying exactly the same yardstick to the hauls south of Richmond, Southern lines had remaining a *surplus (over and above operating expenses, taxes, and a return of 5¾ per cent) of $982,674.76.*

The upper half of Table 2 shows the aggregate revenue effect on Northern lines of the 4,662 cars which moved for single-line hauls to destinations in Central territory. While there is an indicated surplus of $52,607 on these 4,662 cars, $39,644.92 of this surplus is accounted for by 1,253 cars which moved for very short distances (Hodkinson Ex. No. C-7). These cars are affected by the minimum provision of the Commission's order and the costs allocated to them are thus very much understated, as fully explained by Witness Hodkinson (R. 1320-22). At most, therefore, the bulk of the cars to Central territory points produced but a nominal amount over and above expenses and taxes. The data as to individual hauls and individual lines in the case of the Central territory cars are included in Hodkinson Exhibit No. C-6.

In the lower half of Table 2, the *aggregate revenue effect* of the 17,324 Trunk Line and New England cars, and the 4,662 Central territory cars, a total of 21,986 cars, is shown. This table indicates that the *prescribed divisions failed to meet the allocated operating expenses and taxes by the sum of $862.64 without any return on investment.*

Coming to the individual showings of the three principal appellants, Table 3 indicates that the *Pennsylvania's deficit amounts to $62,475.77* on a movement of 15,782 cars. While there is an indicated surplus of $17,811.41 on the 3,275 cars handled by the Baltimore & Ohio, this results from the fact that the

Baltimore & Ohio's hauls on this traffic are all comparatively short, the weighted average haul being but 112 miles as compared with an average system haul on all traffic of over 190 miles so that the estimated expenses of the Baltimore & Ohio are *understated,* as was admitted by witnesses for Southern lines (R. 1429, 1463).

Appellants contend that the studies herein relied upon are supported by this Court's decision in *Wood* v. *Vandalia R. R. Co.,* 231 U.S. 1. There the railroad company sought to show that certain class rates prescribed by the Indiana Commission for application on that portion of the carrier's line between Indianapolis and the western boundary of Indiana, a distance of about 80 miles, were confiscatory.

To show confiscation the railroad exhibited its gross revenues from class rate traffic on the 80 miles of road involved for each of three years prior to the effective date of the order. It likewise showed the gross revenues that would have accrued during each of those same three years had the reduced rates been in effect. This showed a material reduction in each year.

To estimate the operating expenses chargeable to the class rate traffic the ratio that all operating expenses on that line bore to gross earnings on that same line from every source was applied to each year's gross revenues from the class rates before they were reduced. Since the resulting figure in each year was more than the gross revenues which would accrue under the prescribed rates, it was claimed that this showed confiscation, and the lower court so held.

The foregoing and other facts were recited by this court in its opinion, and at page 5 thereof appears this language:

"It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different sorts of traffic. It is predicated of the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part but simply of that of the entire traffic to which it applies."

Subsequently, however, in the same opinion, at pages 6 and 7, this court qualified its previous statement in the language quoted below:

"In these circumstances, the ratio of total expense to total earnings affords, in itself, no sufficient basis for determining the cost of the transportation of the particular traffic covered by the order under review. It alone furnishes no ground for invalidating the finding of the Commission that the existing rates were exorbitant and that the substituted rates would be fair. *Before such a ratio could be used in setting forth the cost of a specified portion of the traffic, it would be necessary to have evidence either justifying the conclusion that the cost in proportion to the revenue was substantially the same for that part of the traffic as for the whole, or, if there were a material difference, satisfactorily showing its nature and extent.*" (Emphasis supplied)

While appellants in the instant case have used a cost unit which is "found by bringing together a great variety of operations * * * and different outlays for different sorts of traffic," they have gone further and offered positive proof that the unit expense of handling citrus fruit traffic is higher than the similar expense of handling the average of all traffic, and in addition that the portions of lines principally used in handling citrus fruit are more expensive to operate than appellants' system lines as a whole.

The theory of the studies presented by appellants is likewise supported by this court's opinion in *Smyth* v. *Ames,* 169 U. S. 466, where the legislature of Nebraska had established a classification for all intrastate freight carried by railroad, and had fixed the maximum rates to be charged therefor. While the court there held that each case must depend upon its special facts, it also, in effect, held that the ratio of expense to earnings on the entire business of a railroad could be taken to show the cost of some particular item or class of traffic if, from the evidence, the conclusion is warranted that its cost in proportion to the revenue therefrom could be properly so expressed.

In the light of the foregoing, appellants respectfully insist that the record establishes that their costs and expenses reasonably chargeable to the transportation of citrus fruit handled by them, together with an allowance for taxes fairly attributable to that service, plus car rental, exceed for particular hauls, for individual carriers, and for appellants in the aggregate, the revenues that would be received by them under the prescribed divisions and that the order pre-

scribing such divisions must be held void because it results in confiscation.

It is settled law that while the Commission may give a weaker road, because of its financial needs, divisions "larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,'" the share left to its connections must be "adequate to avoid a confiscatory result."

New England Divisions Case, 261 U. S. 184, 194, 195;
Dayton-Goose Creek Ry. v. *U. S.,* 263 U. S. 456, 477.
United States v. *Abilene & S. Ry. Co.,* 265 U. S. 274, 284, 285.

This Court has also held that where rates found by a regulatory body to be compensatory are attacked as confiscatory, the courts may inquire into the method by which its conclusion was reached, and if the method pursued is fundamentally erroneous it constitutes a denial of due process of law.

Chi. etc. Ry. v. *Pub. Util. Comm.,* 274 U. S. 344, 351;
Nor. Pac. v. *Dept. of Public Works,* 268 U. S. 39, 44.

The method pursued by the Commission and the court below in arriving at their respective determinations that the prescribed divisions were not confiscatory was fundamentally erroneous and constitutes a denial of due process of law.

In the instant case, unquestionably conscious of the fact that it was prescribing a very low basis of

divisions for Northern lines, because of its conception of Southern lines' financial needs, the Commission sought to comply with the requirement that the divisions to Northern lines be "adequate to avoid a confiscatory result" by saying (R. 75), in reference to the old divisional agreement, "It may be *presumed* that the agreement, having been voluntarily entered into, was not confiscatory of the property of either group of carriers when it was entered into, and the evidence of changing conditions between the dates above set forth is *not convincing* that it subsequently became so." (Emphasis supplied.)

In its second decision (R. 87), the Commission further said that in its prior report it had "expressed the view that the divisions under that agreement could not be considered confiscatory." In its second decision the Commission also said (R. 87):

> "So far as we are able to estimate from data of record it (the prescribed divisions) would afford northern lines more revenue than they would receive under the former basis of rates and divisions * * *."

Seemingly the inference is that if the 1908-10 divisions were not confiscatory at the time when they were entered into, and changing conditions had not subsequently made them so, then the prescribed divisions could not be confiscatory. But inferences of this character can not serve as such definite findings of a non-confiscatory result to Northern lines as will validate the Commission's order.

The court below in effect relies upon a similar presumption when it finds "most persuasive" the fact that as to the Pennsylvania at least even the divisions

as settled would be confiscatory on the car-mile basis, and that it is difficult to believe that this carrier would have acquiesced in divisions actually confiscatory. This particular reason is dealt with more fully in another part of this brief (*post,* p. 112). It is sufficient here to say that the arbitrary reliance by the Commission and by the lower court upon presumptions that old divisions, or certain present divisions, were sufficient to avoid confiscation in the face of evidence of a persuasive character to the contrary, was fundamentally erroneous and constituted a denial of due process of law. The situation is very similar to that which prevailed in *Chicago, etc. Ry. Co.* v. *Pub. Util. Comm., supra,* where this court said at page 350:

> "The evidence introduced by the carriers was sufficient to warrant, if not to require, a finding that as to the lines of all the petitioners the intrastate log rates in question are very low in comparison with the rates on other commodities * * *";

and that as to certain of the carriers "they are confiscatory." But, continues the opinion:

> "* * * respondent and the court refused to consider and give weight to that evidence because, as they held, the intrastate log rates were not to be dealt with separately, but were to be considered in connection with the interstate lumber rates * * *".

In reversing the judgment of the lower court this court said:

> "It is impossible to sustain the refusal to consider the evidence introduced by the carriers to show that the rates in question are too low and confiscatory."

In the instant case the evidence clearly was sufficient to warrant, if not to require, a finding that as to appellants the divisions prescribed are very low in comparison with those prescribed for Southern lines, and at least as to certain Northern lines that they are confiscatory. The Commission and the court below, however, refused to consider and give weight to that evidence because of a reliance upon the unwarranted presumptions already stated that prior divisions were adequate to avoid confiscation. This clearly violates the principle of due process.

F. The Prescribed Divisions Likewise Violate the Provisions of Section 15(6) of the Interstate Commerce Act Which in Terms Requires Prescribed Divisions to Pay Operating Expenses, Taxes, and a Fair Return on the Property Used in the Service.

In paragraph XVIII of their petition as amended, appellants allege confiscation, and further that the prescribed divisions are in violation of Section 15(6) of the Interstate Commerce Act, and that the order entered is in excess of the Commission's statutory powers. The section and paragraph of the Act just referred to requires that the Commission, in prescribing "just, reasonable, and equitable" divisions, shall, among other things, give due consideration to "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation."

This requirement imposes upon the Commission the duty to balance and appraise the amount of rev-

enue required to pay the operating expenses, taxes, and a fair return on the properties of *both* sets of carriers. Likewise, the burden upon appellants of showing confiscation is not fully carried without a showing that, while appellants will receive less than a fair return, the Southern lines will receive more than a fair return out of the prescribed divisions. This for the reason that the entire through rates as prescribed by the Commission might be confiscatory, and a fair and equitable division of such rates would necessarily result in confiscatory divisions to both sets of carriers. Therefore in this case appellants have felt it necessary to compare the revenues that will be received by both sets of lines by the same yardstick so that it could be demonstrated that the prescribed divisions for appellants would not produce anything toward a fair return, while, for the Southern lines, the same method or system of divisions tested by the same yardstick would produce amounts sufficient to pay far more than a fair return.

Counsel for the Southern lines say that the reasonableness of their divisions is not in issue in this proceeding. This is the same as saying that this court is not concerned with the question of whether the Commission has performed its statutory duty with respect to both sets of lines. In the studies presented it appears that both for particular hauls and in the aggregate the estimated expenses to appellants (including operating expenses, car rental, and a reasonable allowance for taxes, but with no allowance for return on investment) exceed the gross revenues per car, and in the aggregate, which they would receive under the prescribed divisions. On the other hand, the same exhibits show that the Southern lines, after allowing for the same character of expenses,

will receive amounts available for return on investment far in excess of a minimum fair return. Thus Hodkinson's Exhibit No. C-19 shows that tested by his car-mile study the prescribed divisions fail by substantial margins to afford any return whatever to the Pennsylvania or the R. F. & P.; that they afford a return of 4.42 per cent to the B. & O., and returns of 15.43 and 10.45 per cent, respectively, to the A. C. L. and the S. A. L. Typical of the situation is the following compilation showing the amounts available for return on investment for both Northern and Southern lines on shipments to six important destinations:

Difference Between Estimated Expenses and Gross Revenue Per Car From Prescribed Divisions.

	Northern lines		*Southern lines*	
	Available for return on investment			
	A.C.L. Origins	*S.A.L. Origins*	*A.C.L.*	*S.A.L.*
Altoona (P. R. R.)	$ 9.09*	$ 9.02*	$ 98.02	$ 91.32
Baltimore (P. R. R.)	18.69	18.60	98.72	89.55
Baltimore (B. & O.)	18.84	21.03	94.22	94.05
Buffalo (P. R. R.)	26.07*	28.55*	106.15	95.78
New York (P. R. R.)	7.62*	7.75*	105.28	99.19
Philadelphia (P. R. R.)	1.59	2.51	105.83	102.92
Philadelphia (B. & O.)	2.70	5.33	103.37	105.69
Pittsburgh (P. R. R.)	15.39*	14.98*	100.39	93.62
Pittsburgh (B. & O.)	10.24*	7.56*	100.51	98.15

*Indicates deficiency under estimated expense per car.

NOTE A—"Estimated expense" includes operating expenses, car rental, and an allowance for taxes.

NOTE B—Amounts shown for Southern lines taken from Hodkinson Ex. No. 6-A, pages 2 and 4. Amounts for Northern lines taken from Hodkinson Exhibit No. 4.

It further appears that in the aggregate on the 17,324 cars included in the study, and using exactly the same formula for determining expenses for both Northern and Southern lines, appellants would receive *nothing whatever* for return on investment allocable to citrus fruit, but would have suffered an aggregate deficiency of $53,469.79 under the estimated expenses, while *Southern lines would have received* in the aggregate, as available for return on investment, a sum approximating $1,767,078.86 in excess of estimated expenses, plus car rental and a reasonable allowance for taxes, equivalent to a *12.95 per cent return on investment* "fairly attributable" to the handling of citrus fruit.

Under such circumstances appellants contend that *as to them* the Commission has ignored the specific requirement of the statute that in prescribing divisions it must give "due consideration," among other things, to the "fair return" on the railway property "held for and used in the service of transportation," and that the Commission has therefore exceeded its statutory powers and deprived appellants of their property without due process of law.

The Commission apparently takes the position that this "fair return" on railway property "held for and used in the service of transportation" means the fair return received by carriers from all their traffic on all their railway property. Appellants insist, however, as will be more fully developed in connection with another contention (*post,* pp. 148, *et seq.*), that, especially where a single commodity is involved it is the fair return on the property *devoted or fairly attributable* to the transportation of that commodity that should constitute the criterion. In *Beaumont,*

S. L. & W. Ry. Co. vs. *United States, supra,* this court said at page 89:

> "There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it *plus a reasonable return on property value fairly attributable to that service.*" (Emphasis supplied.)

In the instant case appellants have shown that the revenues which accrue to them under the prescribed divisions will not for particular hauls, for individual lines, or in the aggregate, yield operating expenses reasonably chargeable to those individual hauls, to those individual lines, or to the aggregate service, and that there is *absolutely nothing* left for return on property value "fairly attributable" to the service which they perform in transporting citrus fruit.

G. Studies Based on the System Cost Per Gross Ton-Mile, a Unit Which Defendant Southern Lines Admitted and the Court Below Found Would Understate the Cost of Handling Citrus Fruit, Establish the Fact of Confiscation as to the Two Principal Appellant Lines.

While appellants, for reasons already given, used the system total car mile expense as the unit in their principal studies, they did not stop there. Witness Hodkinson, in Exhibits Nos. C-12, C-13, and C-14 (R. 1324-26), presented other studies for the Baltimore & Ohio, the Pennsylvania, and the Richmond, Fredericksburg & Potomac, as well as the two principal Southern lines, based on the gross ton mile expense unit which Southern lines employed in their exhibits. The exhibits which he submitted using this unit cover the same 17,324 cars as were covered by the total car-mile studies. The following table shows the results for the three principal Northern lines (appellants), and the two principal Southern lines:

Railroad	Amount Required to Produce a 5¾% Return	Net Income	Per Cent of Return
Pennsylvania	$153,914	$51,073	1.91
B. & O.	15,017	24,958	9.56
R. F. & P.	77,550	15,967*	no return
A. C. L.	$425,505	$999,883	13.51
Seaboard	370,842	698,904	10.84

* Deficit.

The 5¾ per cent return shown in the foregoing table is based on the investment of the respective carriers in road and equipment, which investment has

been used by both sides to the controversy and by the Commission throughout this proceeding. The portion of the investment allocated to freight was determined by the ratio that the net operating expenses for freight bore to the total operating expenses (R. 1234).

One of the principal accounting witnesses for the Southern lines admitted that "* * * the gross ton-mile basis does not truly reflect either for the Southern lines or for the Eastern lines, on the system average, the cost of handling the traffic" (R. 1418), and the court below found "it was generally agreed" that in using the gross ton-mile method, "the cost of carrying a light commodity like citrus fruit in expedited service would be underestimated" (R. 248), and that "costs measured on the average gross ton mile" would probably "not be as great as the cost of carrying citrus fruit" (R. 257). We therefore respectfully submit that it is undeniably true that the gross ton-mile basis substantially *underestimates* the cost of handling citrus fruit. No basis of determining cost has been suggested by anyone according to which the prescribed divisions will produce for appellants anything approaching a fair return on their investment in property used in the transportation of citrus fruit. On the other hand every basis suggested, when applied to the transportation performed by the Seaboard Air Line and the Atlantic Coast Line south of the gateways, will produce for these Southern lines, under the basis of divisions prescribed by the Commission, substantial amounts over and above operating expenses, taxes, and a fair return on property reasonably attributable to the transportation.

The Court's particular attention is invited to Hodkinson's Exhibit No. C-19, Appendix E hereto. Any prescribed basis of divisions which produces the results shown on this exhibit when tested by so many different common yardsticks, is so arbitrary, unjust, unreasonable, and inequitable as plainly to violate the express provisions of Section 15(6) of the Interstate Commerce Act and appellants' constitutional rights.

In Kennedy's Exhibit No. 1, Southern lines presented a study covering the same 17,324 cars to Trunk Line territory as were included in the Hodkinson studies. The study submitted by Southern lines was based on the gross ton mile unit and the witness who presented it eliminated from the general expenses used to determine his average unit of cost certain selected operating expenses for coal and ore wharves, grain elevators, etc., not used in the transportation of citrus fruit. It is, of course, elementary that if expenses for such items are eliminated it would also be necessary to eliminate the ton-miles or the car miles or gross ton miles to which those expenses are attributed, and it is impossible to determine the number of car miles made by grain, or any other traffic, without a special study (R. 1326-27). It follows that the study submitted by Southern lines substantially underestimates the cost of handling citrus fruits, but even so, the study shows that but $95,219 and $66,239 were available for return on investment for the Pennsylvania and the R. F. & P., equivalent to a return of but 3.26 per cent and 4.81 per cent, respectively (R. 1545-46).

II.

THE GROUNDS RELIED UPON BY THE COURT BELOW IN REJECTING APPELLANTS' COST STUDIES ARE UNSOUND, AND THE CONTENTIONS ADVANCED BY APPELLEES (DEFENDANTS BELOW) ARE ENTIRELY WITHOUT MERIT.

While the decision of the court below sympathetically recites at some length (R. 248-51) certain of the facts relied upon by appellants as establishing the soundness of the basic premises upon which the theory of their case rests, namely, that the cost of transporting citrus fruit over their lines exceeds the average cost of handling all traffic, and that the particular portions of appellants' lines necessarily used in the transportation of citrus fruit are more expensive to operate than their system lines generally, the court nevertheless concludes (R. 259):

> "* * * that the evidence does not convince us that system average freight car mile cost may be safely used to ascertain the cost of carrying citrus fruit. There are indeed many expressions of opinion in general terms that citrus fruit is more expensive to transport than 'the ordinary run of freight'. But the meaning of this phrase is uncertain, and we have no assurance that the cost of carrying the ordinary run of freight is the same as the system average car mile cost. In short, we are unable to say that the proposition on which the petitioners rest their case has been established. Indeed, substantial evidence offered on behalf of the defendants indicates that it is probably not true."

Following the foregoing statement in its decision, the lower court gave three reasons which apparently influenced it against the acceptance of the studies. First, it suggests that, in a sense, citrus fruit is han-

dled by appellants in wholesale rather than retail quantities, the inference being that this makes the hauling of the particular traffic less costly than average traffic (R. 259); second, it referred to the "peculiar conditions generally applicable to the movement of freight" on the Pennsylvania Railroad from Potomac Yard to New York, by which, presumably, the court had in mind the heavy traffic density over this line; and third, it stated that "it is most persuasive to us that the expert opinion offered by Northern lines conflicts with the actual practice they have pursued" (R. 259). The court then made certain computations which it says indicate that if the total car mile basis is a proper one even the divisions *as settled* would have resulted in confiscation at least to the Pennsylvania, and that it is "difficult to believe" that appellants "would have acquiesced in divisions actually confiscatory." We shall later refer to and discuss the contentions advanced by appellees (defendants below) against the studies submitted by appellants, and since the three reasons advanced by the court below are of similar import they will all be considered together. In passing, however, we desire to refer to the statement of the lower court to the effect that the meaning of the phrase "ordinary run of freight" is uncertain, and that the court had no assurance that the cost of carrying the "ordinary run of freight" is the same as the system average car mile cost.

In the first place the experts in transportation matters presented by appellants did not use the expression "ordinary run of freight." They used instead such language as unmistakably shows that they had in mind the entire body of freight traffic. For ex-

ample, they individually testified that the cost of handling citrus fruit was greater than—

"the average for all other traffic" (Fell, R. 1207);
"the average of handling all freight" (Covertson, R. 1278);
"the handling of the general run of traffic" (Barbour, R. 1315);
"the average traffic generally on the system" (Menaugh, R. 1344);
"the cost of handling all traffic" (McSweeney, R. 1367-68);
"the cost of handling all freight" (Ward, R. 1370);
"other traffic" (Bell, R. 1375); and
"the average of all traffic" (Teal, R. 1377).

The lower court's distinction between "ordinary run of freight" on the one hand, and average cost of handling all freight on the other, has no application whatever to the facts as developed. But even if it has, it is largely a distinction without a real difference. What the lower court probably had in mind was the expression "ordinary run of freight" used by the Commission in its decision (R. 73). Broadly speaking, a railroad has two general classes of freight, viz., "dead freight," moving at slow economical speeds, and perishable or other high-class freight, such as fruits, vegetables, fresh meats, livestock, etc., which requires special service and expedited handling. Citrus fruit is of the latter class. Generally, the "dead freight" far exceeds the perishables in quantity. Certainly, if the latter class is more expen-

sive to handle than the former, average costs which include both will be less than the perishable traffic cost and more than the dead freight cost. Take, for example, coal as illustrative of dead freight. In the course of its opinion the court recites (R. 255) the fact that products of mines constituted 60.71 per cent of the Pennsylvania's tonnage in 1929. In another portion of its decision, when referring to the inapplicability of the gross ton mile basis to the handling of citrus fruit, the court said:

> "* * * the gross ton mile basis apportions an unduly large share of the aggregate system expense to heavier classes of traffic, *such as coal, which are in fact cheaper to carry,*" (R. 248). (Italics supplied.)

It is obvious that the system car-mile unit of cost would be held down to a conservative level by the preponderance of products-of-mines' tonnage on the Pennsylvania and that it may therefore be safely used to estimate the cost to the Pennsylvania of handling citrus fruit. We again advert to the situation of the Richmond, Fredericksburg & Potomac. Its Superintendent of Transportation testified that in a normal year the R. F. & P.'s citrus and other perishable traffic will equal the number of cars of *all other traffic* (R. 1342). All its perishable traffic gets "identical service" (R. 1340). In the light of the many special services given perishable traffic as compared with dead freight the R. F. & P.'s Superintendent of Transportation—a man of 35 years' operating experience—gave it as his informed judgment that the cost of handling citrus and other perishables was higher than for the remainder of all freight handled

by the R. F. & P. (R. 1340). Obviously if the cost of handling perishables, constituting 50 per cent of all cars handled by that carrier, is more than the remaining 50 per cent (all other freight), the combined unit cost of the two must necessarily be less than the cost of handling perishables and thus entirely proper for use in estimating the cost of handling perishables. A similar conclusion would necessarily follow as to those carriers whose proportion of "dead freight" handled at slow, economical speeds is even greater than that of the R. F. & P.

A. The Decision in *Northern Pacific Railway Co., et al.*, vs. *Department of Public Works of the State of Washington, et al.*, 268 U. S. 39, Is No Authority Against the Use of Single System Averages.

One of the criticisms advanced by Southern lines against the Hodkinson studies was thus stated by the court below (R. 254):

> "* * * Stress is put upon the proof which shows that system average costs are based upon the movement of all kinds of commodities, all lengths of haul and loads per car, varying ratios of loaded to empty movements, movements in car load and less than car load lots, on both main and branch lines; and that the petitioners have used an average cost affected by these many different elements to show the cost of transportation of a single commodity which is affected by a marked peculiarity in divers respects."

Obviously this was an effort on the part of those advancing the contention to bring it within the doctrine of the case cited in the caption. Since the de-

cision in that case was also referred to in the decision of the court below (R. 245), it will be briefly analyzed.

This was a suit by the Northern Pacific, the Great Northern, the Chicago, Milwaukee & St. Paul, and the Oregon-Washington of the Union Pacific System, to set aside an order of the Department of Public Works of the State of Washington, establishing a uniform distance tariff of rates on logs applicable to these railroads. The order was attacked upon the grounds, among others, that it deprived the carriers of property in violation of the due process clause of the Fourteenth Amendment and that the prescribed rates were confiscatory.

A precise issue was the cost on *each* railroad of transporting logs in carload lots in western Washington. The department had made certain findings concerning operating costs, based largely upon deductions from data found in published reports of the carriers and in their exhibits filed in the case. In the language of the opinion of this Honorable Court, what the department did is described as follows at page 43:

> "* * * Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of this traffic was to the *several* carriers, *the Department created a* COMPOSITE *figure representing the weighted average operating cost per 1000 gross ton miles of all revenue freight carried on the* FOUR *systems* and made that figure a basis for estimating the operating cost of the log traffic in Washington." (Emphasis supplied.)

This, the opinion said, was clearly erroneous, for the following reasons. The *composite* figure ignored

the difference in the *average* unit cost *on the individual* systems; the difference on each system in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation was conducted. There were other general criticisms sometimes applicable to system average figures. But in the *Northern Pacific Case, supra, there was no evidence that the system average costs were less than the special costs of handling logs.* In the present case the record is replete with such evidence; there is an overwhelming preponderance of testimony to establish that the *Northern lines' respective system costs are less than the special costs of handling citrus fruit.* Moreover, appellants' cost studies in the present case are not subject to the other criticisms of this court in the *Northern Pacific Case, supra.* On the contrary the studies were prepared with the court's criticisms in mind. In the first place, appellants *have not used a composite* unit representing the average operating cost of different carriers, as was the case in the *Northern Pacific Case, supra.* The studies are based upon *the individual cost units* as developed for the individual carriers and applied to the particular traffic handled by them. Differences in length of haul have been considered and fully explained in the record. The character of the commodity has been considered and it has been conclusively shown by competent evidence that it is more expensive to handle citrus fruit than the average of all traffic. The configuration of the country, density of traffic, and extent of empty car movement with respect to each of the lines or portions of lines principally used in the handling of citrus traffic have

been considered and discussed in the record. The nature of the equipment employed, the extent to which it is used and expenditures required for its maintenance have been considered and proper adjustments made. For example, because the traffic in question moves in refrigerator cars, not owned by the carriers, but for which they pay a rental of 2 cents per car-mile, there have been deducted from the system operating expenses, freight train car repairs, and freight train car depreciation and retirements, before computing the system average total freight car-mile expense.

Moreover, it has been amply demonstrated in the evidence that the unit used by defendants, namely, the system average total freight car miles, is a more dependable and accurate basis than any other known transportation unit for the purpose of estimating the cost of handling light loading commodities such as here involved.

Each *individual* carrier involved in the *Northern Pacific Case, supra*, used its "system" statistics, and apportioned its expenses between main and branch lines on the "car mile" basis. What the individual lines themselves did in the *Northern Pacific Case, supra*, and what was not there condemned, is substantially what appellants have done here. Appellants submit that, to use this court's language, the evidence which they have submitted is "in character persuasive"; and that it is "fairly specific, direct and comprehensive."

B. The Record Does Not Support the Conclusion Stated by the Lower Court That "The Large Volume of Citrus Fruit Transported and the Heavy Density of All Traffic on the Pennsylvania and Baltimore & Ohio Railroads in Trunk-Line Territory, Tends to Diminish the Cost of Transportation Therein."

Under the caption "Evidence Offered by the Defendants" (R. 254), the court below stated the conclusion of fact quoted in the heading and, following this conclusion, the opinion of the lower court continues (R. 255):

> "* * * Approximately 73% of the citrus covered by the petitioners' study went to a small number of large cities, for instance, 11,358 cars out of a total of 24,123 cars of citrus fruit transported over the Pennsylvania's lines in trunk-line territory in the 1928-1929 season went to New York City. At the height of the season, the Pennsylvania seldom received less than 50 cars per day at Potomac Yards, and often as many as 200 cars per day, and it invariably operated one and sometimes two solid trains of perishable commodities per day. More than 100,000 cars of perishables moved into the Potomac Yards from the south annually during the period 1928-1930. Pennsylvania trains out of Potomac Yard, consisting of 50% or more of perishable cars, were similar both in respect to the average number of cars per train and the average adjusted gross tons per train to the average of all Pennsylvania trains out of that yard, and exceeded in these respects the averages for the Pennsylvania system as a whole. A similar showing was made as to the Richmond, Freder-

icksburg and Potomac, but the reverse was true of the smaller volume of citrus fruit traffic on the Baltimore & Ohio."

Presumably this is the part of Southern lines' evidence which the court below had in mind in referring to the handling by the Pennsylvania of citrus fruit in "wholesale" quantities.

The court's statement as to the operation of "solid trains of perishables" is substantially true as to New York, but it gives an incorrect impression of the situation in its entirety. The General Superintendent of the Pennsylvania (Eastern Region), testified that, with few exceptions, the New York market is the only market which will take perishables in solid train loads (R. 1361). During the peak season one of the Harsimus Cove (New York) trains would run virtually solid cars of perishables a substantial portion of the time, but this does not apply to all the trains operated from Potomac Yard to Harsimus Cove which carry perishables on the same day. Taking the arranged freight service trains out of Potomac Yard destined to Baltimore, Enola, Edgemoor, Philadelphia, Greenville, and Harsimus Cove, a check of the movement during the season of 1928-29, when the perishable movement was at its height, developed that only 13 per cent of such trains were solid perishable trains, and a similar check of 1933 operations showed that only 5 per cent of such trains operated out of Potomac Yard were loaded solid with perishables (R. 1361). But conceding that large quantities of perishables are received by the Pennsylvania daily during the height of the shipping season, does this fact tend to diminish the cost of transportation within Trunk Line territory? Before answering the

question, let us look at some of the outstanding facts.

First of all, because of grade conditions a locomotive hauling citrus fruit and other perishables out of Potomac Yard northbound is rated at but 2640 adjusted tons (50 cars), while "the same locomotive in other districts of the eastern region and also on the system is rated as high as 9000 adjusted tons" (R. 1358). The term "adjusted tons" is used by the operating departments of railroads to determine a potential trainload. Because of grade conditions an arbitrary tonnage factor is added to the gross weight of each car in establishing a trainload for a locomotive. That factor on business northbound from Potomac Yard is 5 tons per car (R. 1358).

Second, for a 5200-ton (100-car) train Washington to New York, two engines, two crews, etc., are required from Potomac Yard to Baltimore, whereas from Philadelphia to Pittsburgh one engine of the same type could handle a 5200-ton train as far as Altoona, Pa., and after being helped over the mountains, could continue alone with the train on to Pittsburgh (R. 1358-59).

Third, tonnages of the perishable trains out of Potomac Yard on the Baltimore & Ohio are cut by from 800 to 900 tons per train (R. 1371). In other words, trains with dead freight handle that much more tonnage. Tests made in 1933 showed that Pennsylvania perishable trains out of Potomac Yard northbound were loaded to only 82 per cent of their potential engine ratings (R. 1396) over the sector Potomac Yard to Baltimore. Leaving Baltimore the percentage is still lower. Witness Clark said (R. 1396):

"* * * The rapid drop from 82.1 per cent to 59.2 per cent and 56.5 per cent as the trains proceed northward is explained by the fact * * * that trains carrying perishables must be loaded out of Potomac Yard to cover the grade conditions into Baltimore and then must not be stopped in their northward progress to fill out with other freight and they proceed with an engine capacity that is not then in use."

Fourth, a typical Pennsylvania perishable train out of Potomac Yard to New York carries only 1,085 tons of "pay" freight, but for each ton of freight 3.3 tons of tare weight must be hauled, whereas a typical freight train between the same points with no perishables or high class freight carries on an average 1,533 tons of "pay" freight and only 2.1 tons of tare weight per ton of freight (R. 1397).

Fifth, it is, of course, true that all the many special services accorded to citrus fruit traffic heretofore shown in detail apply whether 10 cars a day are received at Potomac Yard, or whether 200 cars are so received. If anything, the "bunching" of a large number of cars per day would, by reason of congestion, increase materially the terminal handling costs.

Sixth, the court's statement that "Pennsylvania trains out of Potomac Yard, consisting of 50 per cent or more of perishable cars, were similar both in respect to the average number of cars per train and the average adjusted gross tons per train to the average of all Pennsylvania trains out of that yard and exceeded in these respects the average for the Pennsylvania System as a whole" is incorrect. This statement is based on Tassin Exhibit A submitted by Southern lines. Upon rebuttal appellants showed

that this exhibit did not include all cars and, in addition, that in comparing tonnage of trains out of Potomac Yard with system train tonnages the comparison was of unlike things, viz., "adjusted tons" out of Potomac Yard with actual or flat tons for the system R. 1537-38). Clark's Exhibit No. C-5 shows for a typical week on an actual tonnage basis, and including all trains, that the true comparison is as follows:

Pennsylvania Railroad

Gross tons per train—Potomac Yard	1,768
Gross tons per train—System (1929)	2,352
Cars per train—Potomac Yard	42
Cars per train—System	56

In addition Clark's Exhibit No. C-3 compares 202 typical perishable trains, where 98.5 per cent of the cars were perishable, with 213 other fast freight trains moving out of Potomac Yard during the period November, 1928, to May, 1929, inclusive. This exhibit showed that the perishable trains averaged but 72 cars per train while the other trains averaged 90 cars per train (R. 1397).

Finally we have the uncontradicted testimony of Messrs. Clark and Bonn as to the much higher unit costs on those portions of the lines of the Pennsylvania and Baltimore & Ohio between Potomac Yard and New York (*ante*, p. 54).

It follows that the inference which the lower court drew from the handling by the Pennsylvania of citrus fruit in wholesale quantities is not warranted by the facts.

C. The Alleged Heavy Traffic Density of the Pennsylvania and the Baltimore & Ohio Between Potomac Yard and New York Constitutes No Valid Reason Against Appellants' Cost Studies.

Another factor advanced by Southern lines, and followed by the court below, as a reason why appellants' cost studies should not apply is the alleged heavy traffic density of the Pennsylvania and the Baltimore & Ohio between Potomac Yard and New York. This, however, constitutes no valid reason against the cost studies because the traffic density data are—

(1) based on a period long prior to the movement involved in this case with no showing that such periods are typical of current conditions;
(2) erroneous so far as current conditions are concerned; and
(3) entitled to little weight even if their authenticity is granted, and the Commission has repeatedly so held.

On the subject of traffic density the lower court said (R. 256):

> "* * * The effect of heavy freight traffic density is a reduction in the operating expense per unit of traffic for the reason that a large part of the operating expenses remain constant and unaffected by the volume of traffic, and hence as traffic increases, the cost per unit decreases. About two-thirds of maintenance of way and structure expense, 43% of maintenance of equipment expenses, and a substantial proportion of transportation expenses are constant. Heavy passenger traffic density produces a larger spread of expenses common to passenger and freight service, and thereby further decreases freight unit costs."

The data to which the court referred were presented by Witness Knight, of the Southern lines. He introduced Exhibits Nos. K-5 to K-10 to show that traffic density on the chief citrus traffic routes of the Pennsylvania and Baltimore & Ohio north of Potomac Yard was much greater than for the balance of their respective *system* lines. From these and related factors he inferred that the costs of transportation on these routes of the Baltimore & Ohio and the Pennsylvania were less than for the respective systems. Appellants submit that an analysis of the facts clearly proves the unsoundness of any such conclusion.

First of all it should be pointed out that, in the case of the Baltimore & Ohio and the Pennsylvania, the so-called Copeland density charts upon which the showing is based were for the respective years of *1924* and *1927*, six years and three years, respectively, prior to the beginning of the movement here involved. Obviously they may not properly be relied upon for this later period unless they are shown to be typical.

Secondly, the showing is refuted by the very exhibits which it is intended to rebut. For the Baltimore & Ohio, based on the year 1924, Witness Knight testified that the freight density of the Baltimore & Ohio between Potomac Yard and Philadelphia, using revenue ton-miles as the measure of traffic density, was about 352 per cent of the balance of the system (R. 1520). The utter unreliability of the showing is clearly established by the 1929 traffic density figures shown in Witness Bonn's Exhibit No. B-1, and his testimony in connection therewith (R. 1392), from which the following table has been compiled:

Baltimore & Ohio	Miles of Road	Net ton miles	Net ton miles per mile of road	Per cent of System
System	5,658	22,179,733,000	3,920,066	------
Baltimore Division	497	2,215,171,800	4,457,086	113.7

In other words the traffic density as shown by revenue ton miles per mile of road in 1929 was only about 13.7 per cent higher on the Baltimore Division than for the system as a whole. From the same exhibit it may be readily computed that the net ton miles on the Baltimore Division constituted less than 10 per cent of the total net ton miles for the entire system, while the *net freight operating expenses* for the Baltimore Division constituted over *15 per cent* of the total net freight operating expenses for the system.

Third, the Commission itself has unmistakably expressed itself on the subject of traffic density both in this and in other important divisional cases.

In its original report in *Divisions of Freight Rates,* 148 I. C. C. 457, 473, a case which involved the propriety of the divisions between Western trunk lines and Southwestern lines, the Commission said:

> "Moreover, the significance of traffic density can easily be over-emphasized. It is not shown that expense of operation by any means decreases in ratio to increase in traffic density. Indeed it is probable that the chief benefit of a heavy density is that overhead costs, such as return on investment, are lower per unit of traffic."

In its second report in the same proceeding (*Divisions of Freight Rates,* 156 I. C. C. 94, 100), the Commission further said:

"* * * So far as traffic density has an effect upon cost or burden of service, that effect must be reflected in the statistics showing results of operation, and it was upon such statistics that we relied in the last analysis in the case of such costs."

As a matter of fact the Commission's second opinion in this very case states (R. 83):

"* * * On the subject of traffic density we may pertinently quote our statement in our second report in the Southwestern case, 156 I. C. C. 94, 100, that in so far as traffic density has an effect upon cost or burden of service that effect must be reflected in the statistics showing results of operation."

Since the Commission has repeatedly found that the effect of traffic density must be reflected in the statistics showing results of operation, attention need only be invited to the unit costs for the Eastern Region-New York Zone of the Pennsylvania and the Baltimore Division of the Baltimore & Ohio (*ante*, p. 54), which show that the costs of handling all traffic over these portions of the Pennsylvania and the Baltimore & Ohio systems are substantially higher than their respective system unit costs.

In addition to this consideration the Commission, in *New England Divisions Case*, 126 I. C. C. 579, 614, said:

"* * * But densities per mile of road do not tell the whole story in view of the higher capital expenditure entailed by greater density as well as the greater difficulties of operation which are often encountered, particularly at large terminals."

This record shows (R. 1543) that the nine Northern roads principally interested in the handling of citrus fruit in Trunk Line and New England territories have an average investment per mile of $199,239.00 as compared with an average investment of but $76,669.00 per mile for the five Southern roads. In the year 1930 the freight revenue ton miles per $1,000.00 of investment for all Class I carriers in Official territory were 16,352 revenue ton miles as compared with 14,172 revenue ton miles for Class I carriers in the South, indicating merely that in Official territory there is only slightly more traffic over which to spread overhead cost such as return on investment, but here again resort must be had to the operating statistics the results of which have already been shown (*ante,* p. 54).

Appellants have convincingly shown by testimony of experienced operating men, as well as by statistical indices, that the principal routes used by Official lines for the transportation of citrus fruit are more expensive to operate than their respective system lines. The Pennsylvania's Eastern Region—New York Zone costs included in Witness Clark's Exhibit C-1 (*ante,* p. 54), and the Baltimore Division unit costs of the Baltimore & Ohio included in Witness Bonn's Exhibit No. B-1 (*ante,* p. 54), were computed in exactly the same way as the system unit costs shown in Hodkinson's Exhibit No. 1, *and they unquestionably establish that the unit costs on these portions of the lines for all traffic handled are higher than system unit costs for all traffic.* In this connection it is significant that although the Southern lines were furnished at the hearing with the primary accounts upon which the unit expense figures

for the eastern sections of the Pennsylvania and of the Baltimore & Ohio were based, the Southern lines made no attack upon them.

As to these cost figures the court said (R. 257):

> "In reply to the statistical calculations offered by the petitioners, to which reference has already been made, to show that in fact the costs of transportation on these regions of the Pennsylvania and Baltimore & Ohio are heavier than on the respective systems as a whole, the defendants offered a report of the Pennsylvania Railroad to its stockholders in 1929, which, comparing the eastern region and New York zone with the system as a whole, gave figures showing that on the regions in question, operations were equally or more favorable than on the system as a whole with regard to the total number of tons carried one mile, the gross tons per train, train speed, gross tons per train hour, total cars per train, and pounds of coal per 1,000 gross ton miles."

It is obvious, of course, that these data relate to matters of efficiency and not to matters of cost. If defendants could have directly attacked the figures they would have done so, since they were furnished with the underlying data for these cost figures at the hearing.

D. The Fact That Under the Prescribed Divisions Northern Lines Are Accorded Greater Revenues in the Aggregate for Their Hauls North of the Virginia Gateways Than They Had for Years Accepted and Received for This Service Creates No Presumption Against Them on the Issue of Confiscation. Neither Does the Statement Relied upon by the Court That the Pennsylvania's Revenues as Settled Would be Confiscatory on the Car Mile Basis Create Such a Presumption.

The Commission and the Southern carriers have sought to draw the conclusion that the prescribed divisions are not confiscatory to appellants because the latter for years prior to November 9, 1928, had accepted divisions which in their aggregate effect were on a slightly lower basis. Thus the court below says that "very great emphasis is placed" upon the fact that based on the 1928-29 season's movement the divisions prescribed by the Commission to Trunk Line and New England territories would yield to Northern lines $62,935.90 more than the divisions which they would have received had the basis of divisions in effect for 20 years prior to November 9, 1928, been applied (R. 257).

Of somewhat similar import is the statement by the court (R. 259)—"it is most persuasive to us that the expert opinion offered by the Northern lines conflicts with the actual practice they have pursued"—following which the court made certain computations which indicated that even the revenues as settled were confiscatory on the car mile basis, at least so far as the Pennsylvania is concerned.

To give any weight whatever to the circumstance that the prescribed divisions yield slightly more in the aggregate than the old divisions, it must be assumed that the old divisions were sufficient to avoid confiscation. The facts of record will sustain no such assumption. The very fact that the Commission increased the divisions in the aggregate for the lines north of Richmond is persuasive that the old agreed basis of divisions was thought by it to be too low in the aggregate. Any possible presumption that the former divisions were sufficiently high has been completely rebutted by the action of the Commission in increasing the aggregate amount of those divisions. The trouble is it did not go far enough.

It is a fact that the amounts of the divisions which appellants had accepted to *interior* Trunk Line and New England points were those originally named and designated by them. But it is emphatically not a fact so far as the divisions to the port cities (New York, Philadelphia, Baltimore and Boston) are concerned. These divisions were in substance compelled by the very water competition which depressed the all-rail rates to those ports (R. 556). This is corroborated by the Commission's decision in *Railroad Commission of Florida* vs. *Savannah, F. & W. R. Co., et al.,* 3 I.C.C. 688, decided October 29, 1891, where the Commission found that the all-rail routes had to meet "sharp competition" of the rail and water routes operating through Jacksonville, Savannah, and Norfolk (R. 555). As a result of these competitive influences the Northern lines were forced to accept factors in dividing rates to North Atlantic port cities materially below their normal basis and the 1908-10 agreement perpetuated these

subnormal factors. The fact that rates to the port cities were depressed by competition was admitted by Witness Doss of the Southern lines in his testimony before the Commission when he said:

> "* * * I agree with Mr. Kentfield's view that these rates on citrus from Florida to the East were, during the early days, very largely influenced by water competition * * *" (R. 891).

In prescribing the Northern lines' divisions in this case the Commission took these depressed Northern factors to the port cities, slightly increased the division to New York, and then reduced all divisions to interior Trunk Line and Central territory points to the same relative level. This accounts for the very drastic reductions made at such interior points as Altoona, Buffalo, and Pittsburgh.

Subsequent to the establishment of the old basis of divisions, following the prescription of citrus fruit rates in 1908, conditions had so changed as completely to negative any presumption that they were not confiscatory in 1928. Important changes in the relative general rate levels in Southern and Official territories had occurred subsequent to the time when divisions were agreed upon out of the rates prescribed in 1908. The effect of these general rate changes was to produce a relatively greater increase in the general level of rates in Official territory than in Southern territory and to bring the levels of the two territories more closely together. These general rate changes were not fully reflected in corresponding increases in the Northern lines' divisions of the rates on citrus fruit. Thus the Northern lines' divisions were not

increased following the granting of the 5 and 15 per cent general increases to Northern carriers in 1915 and 1918, respectively, although the Commission in granting such increases authorized the joint through interterritorial rates to be increased sufficiently to permit this. However, the granting of these general increases indicated a greater relative value of Northern lines' service which should have been reflected in their divisions. In 1920 the Commission recognized the need of Northern lines for a greater measure of general increase, and authorized a 40 per cent increase in Official territory, as compared with a 25 per cent increase in Southern territory. Despite this recognition of the need of Northern lines for a greater measure of increase, the Northern lines' divisions of the citrus fruit rates were increased only 33 1/3 per cent and Southern lines received the same percentage of increase.

The record shows that from 1915 on, the Northern lines had expressed dissatisfaction with their divisions because of their failure to reflect the proper measure of general increases. In its original report the Commission recognized this situation in the following quotation (R. 72):

> "* * * Defendants had urged for some time, however, that their citrus-fruit divisions should have been increased at the time of the 5 and 15 per cent rate increases in Official territory in 1915 and 1918, even though the rates themselves were not affected, and that at the time of the rate increase of 1920, the Northern divisions should have been increased 40 per cent instead of 33 1/3 per cent."

In the light of these changed conditions the action of the Northern lines in retaining increased divisions following the abrogation of the divisions agreement, which was effected by the prescription of new rates in 1928, *was more than justified.* The action of the Commission in increasing these divisions in the aggregate furnishes cogent evidence that the prior divisions were in fact confiscatory to them and that they could not consistently accept such low proportions for the future. As we have already said, the only trouble is that the Commission did not go far enough.

Appellants submit that if their acceptance of agreed divisions over a period of years can be said to have any evidentiary force whatsoever, it is more than offset by the facts showing changed conditions, and by the Northern lines' protests against the prior basis, which culminated in their refusal to continue to accept the former agreed basis of divisions that was abrogated by the prescription of reduced joint through rates in 1928.

Coming to the statement by the court that "it is most persuasive to us that the expert opinion offered by Northern lines conflicts with the actual practice they have pursued," and that on the car-mile basis the revenues as settled were confiscatory, at least so far as the Pennsylvania is concerned, the court below lost sight of the fact that, as shown by Hodkinson Exhibit No. 10, 16,965 of the 17,324 cars included in the Hodkinson studies moved to the three Northern ports of New York, Philadelphia and Baltimore, where Northern lines' divisions had long been depressed by water competition as already shown. The conversion of the old per box divisions to amounts per 100

pounds left the divisions to these port cities depressed as before. The fact is that to the points reached by single-line hauls of either the Pennsylvania or Baltimore & Ohio north of Potomac Yard the average reduction in divisions under the Commission's decision was only $4.34 per car (R. 1257), but on the remaining 7,059 cars moving to destination in Trunk Line and New England territories for multiple-line hauls the total reduction amounted to $221,192.93, (Hodkinson Ex. No. 2-A, p. 124), or an average reduction of $31.33 per car (R. 1257). Since the cost studies were confined to the cars that moved for single-line hauls over the Pennsylvania and Baltimore & Ohio, the circumstance that the total expenses on the car-mile basis approach within about $30,000 the revenues as settled is of no significance.

Further, Northern lines have never agreed that the provisional basis of divisions employed by them in respect of the prescribed rates were sufficient to avoid confiscation. They have always been of the view that any fair basis of division would accord them greater revenues, and they intended their employment of the provisional basis merely to bridge the gap of the period during which the Commission was determining the divisions of rates on all interterritorial traffic between Southern and Official territories.

E. Other Reasons Advanced by the Court and by Defendants Below Do Not Affect the Validity of the Studies Presented.

(1) The Unwarranted Criticism That the Total Car Mile Unit Used Is Merely a Statistical Generalization.

Perhaps the principal remaining criticism against the Hodkinson studies is that of defendants below, to the effect that they rest on a basis which is "merely a statistical generalization" (R. 257). The lower court refers to it as "a statistical generalization of uncertain meaning" (R. 259). Here again it is clear that the effort was to bring the facts of this case within the scope of this court's decisions in *The Minnesota Rate Cases,* 230 U. S. 352, 465, and *Missouri Rate Cases,* 230 U. S. 474, 506. In those cases the state authorities had prescribed a complete schedule of rates covering state operations. The carriers alleged that the resulting rates were confiscatory, and by oral testimony endeavored to prove that the relative ton-mile cost of handling the entire body of intrastate traffic of the state was from three to six, or seven times greater than the cost of handling interstate traffic. The court concluded that oral testimony, based on a general estimate of conditions as to the exact extra cost of intrastate business, could not be accepted without the aid of statistical information, and it stated that it "would appear to have been not impracticable" to have had "accounts kept or statistics prepared" for selected test periods.

The doctrine of the cases cited is not applicable here for the following reasons:

First, they involved the question of the relative cost of handling *all intrastate traffic* of a particular

state as contrasted with the system cost of handling all interstate and intrastate traffic. Here the question is as to the cost of handling a single commodity, namely, citrus fruit.

Second, numerous witnesses for Northern lines testified as to the impracticability of making a direct cost study (R. 1223, 1268, 1277, 1379). This was even admitted by one of the accounting witnesses for Southern lines, who stated that it would have been "impracticable" to make such a study in this case.

Third, in the cases cited, witnesses estimated the extra cost of intrastate business as from "three to six or seven times that of the interstate business per ton-mile," which the court said "shows both the difficulty and the lack of certainty in passing judgment." In the instant case appellants did not try to show the exact ratio that the citrus fruit cost bore to the average cost. It was sufficient for their purposes to show that it cost no less than the average cost of handling all traffic. The record shows that experienced operating officials of Northern lines were unanimous in their informed judgment and opinion, based on facts heretofore recited (*ante,* p. 40), that it costs *more* to handle citrus fruit than the average cost of handling all traffic, *and this conclusion is corroborated by the finding of the Interstate Commerce Commission that citrus fruit is undoubtedly more expensive to handle than the "ordinary run of freight"* (R. 73).

Fourth, the opinions of the operating experts in the instant case were supported by statistical evidence that the unit costs of handling traffic over the principal parts of the lines of the Pennsylvania and Balti-

more & Ohio used in transporting citrus fruit were materially higher than the similar system unit costs, (*ante*, p. 54).

Fifth, in the cases cited there was no "suitable discrimination between the interstate and intrastate traffic" in determining the alleged cost ratios. In the instant case there is no occasion for a similar distinction. Citrus fruit, like other perishable traffic, is handled in special, light-loaded, fast freight trains, and the contrast is between traffic so handled and that of dead freight, in heavy trains, moving at slow, economical speeds. It will be recalled that an expert transportation engineer testified that it requires twice the amount of energy to produce a ton-mile of citrus fruit at double the speed of coal traffic as it does a ton-mile of coal (R. 1381-82); that it requires approximately the same, or a greater amount of, energy to move a carload of light-loaded traffic at high speed as a carload of heavy-loaded traffic at slow speed (R. 1381-82); and that the fuel consumption per car-mile of the light-loaded fast trains will equal or exceed that for the heavy-loaded slow trains (R. 1387).

It is clear from the foregoing facts that the doctrine of *The Minnesota Rate Cases, supra,* has no application here.

(2) The Alleged Small Portion of System Lines Used by the Pennsylvania and the Baltimore & Ohio in Handling Citrus Fruit.

In reciting the evidence offered by defendants, the court said:

> "* * * It is pointed out * * * that the average car mile cost is based upon the movement of freight on the entire system, while in the case of the Pennsylvania and the Baltimore & Ohio, com-

prising 10,000 miles and 4,500 miles of line respectively, less than 15% of the total system mileage was used in the movement of citrus fruit in the season of 1928-1929."

Even if true, this statement has no bearing on the validity of the studies presented. The fact is that, taking the Pennsylvania as illustrative, page 56 of Hodkinson Exhibit No. 2 shows that in the 1928-29 season the Pennsylvania handled citrus fruit traffic to 62 different destinations in five different states in Trunk Line territory. It used substantially every mile of its lines from Washington, D. C., to Pittsburgh, Pa. to the west, to Buffalo, N. Y., Rochester, N. Y., Elmira, N. Y. and intermediate points to the north and to New York City, N. Y. and Atlantic City, N. J. to the east. In Central territory from the Cincinnati gateway the record likewise shows (Hodkinson Ex. No. C-1, p. 32) that traffic was handled to numerous destinations located in six different states. These destinations ranged from Buffalo and Pittsburgh to the east, to Cleveland, Ohio, and Grand Rapids, Mich. to the North, and Indianapolis and Chicago on the West. It is clear that the statement as to the small amount of the Pennsylvania's mileage used in transporting citrus fruit is contrary to uncontrovertible facts. The witness who testified as to the small amount of mileage used took only certain extreme points and "did not add every line individually over which the Pennsylvania Railroad handled the traffic" (R. 1437).

(3) The Divisions Accepted by Northern Lines on California Citrus Fruit Are Immaterial to the Issues Here.

In connection with certain testimony offered by Southern lines as to divisions accepted by the Penn-

sylvania and one other railroad from the rates on California citrus fruit, the court said (R. 258):

> "The willingness of the northern lines to accept voluntarily the prevailing divisions on California citrus fruit, is not without significance. The Pennsylvania and the New York, New Haven and Hartford Railroads accept on the movement of California oranges considerably less revenue than they receive for similar movements under the prescribed divisions on Florida citrus fruit, and it appears that if the expenses on California fruit are determined on the car mile basis, these roads suffer even larger deficits in this respect than those of which they complain in the pending case."

In the lower court both the Commission and the Southern lines isolated certain divisions to individual Official territory destinations, accepted by Northern lines on California citrus traffic, and contrasted them with the prescribed divisions on Florida traffic. Whether Northern lines to individual destinations get less compensation mile for mile on some individual haul on California traffic than under the prescribed divisions on citrus fruit from Florida has no probative value as evidence on the issue of confiscation. Carriers frequently participate in the handling of traffic which yields something in addition to out-of-pocket cost, the theory being that trains will run just the same whether the particular traffic is there for handling or not, and that if the traffic pays something in addition to the bare out-of-pocket cost there is at least a small contribution toward meeting general expenses. This is the well-recognized "added traffic" theory. But there is a clear distinc-

tion between what a carrier in the exercise of its managerial judgment does voluntarily and what the Commission may lawfully impose upon it. The Commission itself has recognized this in the rate-making field. For example, in *Southern Class Rate Investigation,* 100 I. C. C. 513, 611, the Commission said:

> "In fixing maximum reasonable rates competition is not a factor which we may take into consideration. The carriers may, within limitations, make low rates for the purpose of meeting competition, but we are without power to compel them to meet it."

The soundness of this principle is attested by numerous decisions of this court.*

Moreover, as was admitted by Witness Doss of the Southern lines on cross-examination, the fact is that Northern lines get the same proportion on *all* traffic interchanged with transcontinental lines as they do on citrus fruit; that the Southern lines likewise accept the same amounts on traffic interchanged with the transcontinental lines, and that to get an accurate idea of the compensatory character of transcontinental divisions "the whole body" of transcontinental traffic would have to be considered (R. 1508). Finally, the entire subject of California divisions was fully explored in the record before the Commission (R. 51). The Commission, referring to these divisions, concluded with this statement (R. 51):

> "We agree with defendants' statement that for neither the northern or southern lines do California divisions constitute a reliable guide."

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* *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, 543; *Southern Pacific Co.* v. *I. C. C.*, 219 U. S. 433, 441, 449; *Louisville & Nashville Railroad Co.* v. *United States*, 238 U. S. 1, 11, 12, 13. See also *Atchison, Topeka & Santa Fe Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591, 592, 594, 595.

III

GROUP CONFISCATION

Appellants contend that there is a qualification of the doctrine of confiscation, as applied to groups of carriers as distinguished from individual carriers, which is applicable to a state of facts such as exists in the instant case. This qualification, for convenience, has been termed "group confiscation," or "confiscation in the aggregate," and involves a discussion of the right of a court of equity to enjoin or set aside an entire scheme or system of divisions prescribed by an order of the Commission for numerous individual carriers comprising a territorial group such as are known in this case as "Northern lines," serving Official territory.

The substance of the contention is that divisions prescribed in the aggregate for all railroads operating in a given territory which do not produce a fair net railway operating income on the aggregate value of their properties employed in the handling of the citrus fruit traffic, may be condemned and declared to be confiscatory in the aggregate. This conclusion must logically and inevitably follow from a consideration of the rights and duties of the Commission with respect to the prescription of rates and divisions by groups or in the aggregate as defined in numerous decisions of this Court. A brief review of some of these decisions is necessary, and in so doing we will discuss in order: the group system of rate-making, the group method of prescribing divisions; the present provisions of Section 15a (2) of the Interstate Commerce Act, as amended by the Emergency Transportation Act, 1933, and, finally, the considerations which inevitably lead to the conclusion that divisions prescribed in the aggregate may be condemned in the aggregate.

A. The Group System of Rate-Making.

Prior to the Transportation Act of 1920, the Interstate Commerce Commission on numerous occasions passed comprehensively upon substantially all rates in a large territory and thus of necessity a group system of rate-making came into being. As explained by Mr. Justice Brandeis in the *New England Divisions Case,* 261 U. S. 184, at page 197:

> "For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, sec. 12, 36 Stat. 539, 551, 552, to be upon the carrier."

With the enactment of the Transportation Act of 1920, the group system of rate-making received the express approval of Congress. As stated by the Supreme Court in *Dayton-Goose Creek Ry.* vs. *United States, supra*, at page 476:

> "By Section 422 of the Transportation Act, there was added to the existing Interstate Commerce Act and its amendments, Section 15a. The section in its second paragraph directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair

net operating return upon the property they hold in the aggregate for use in transportation."

And again, at page 479:

"The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return."

And the court pointed out, page 480:

"Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section . . ."

Thus, the group system of rate-making which had been followed by the Interstate Commerce Commission prior to the Transportation Act was specifically authorized and provided by the statute. Since its enactment, this court has repeatedly approved the Commission's use of the group method of making rates, and has emphasized that, in removing discrimination against persons and localities in interstate commerce, "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute."

Wisconsin vs. *C. B. & Q. R. Co.*, 257 U. S., 563, 579;
Georgia Pub. Ser. Comm. vs. *U. S.*, 283 U. S., 765;
United States vs. *Louisiana*, 290 U. S., 70.

The latest discussion of the group method of fixing rates appears in the case last cited. The court said (pp. 75-76):

> "As pointed out in the reports of the Commission in this case and others . . . Section 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra*, 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

B. The Group Method of Making Divisions.

Just as the group method of rate-making was specifically incorporated in the Transportation Act, so was the group method of fixing divisions. This was made clear by Mr. Justice Brandeis in the *New England Divisions Case, supra*, when referring to the Transportation Act of 1920, he said (pp. 191-98):

> ". . . two new devices were adopted: the group system of rate-making and the division of joint rates in the public interest."
>
> * * * * *
>
> "It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of

divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it."

After the passage of the Transportation Act, 1920, the Commission was quick to adopt the group system of prescribing divisions and its first opportunity came in the *New England Divisions*, 62 I. C. C., 513, on rehearing 62 I. C. C., 564.

On rehearing the Commission made findings as to the relative cost of the performance of the interchange traffic, certain relative statistics of operation, certain facts concerning the financial needs of the New England roads, and, following these findings, made the following observations as to proposed general increases or reductions in rates:

> "In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."

A suit in equity was brought to enjoin and set aside the order of the Commission increasing the divisions of the New England lines. The third reason why the petitioners in that case thought the order of the Commission should be held void was that it was based on the theory that the Commission had authority to fix divisions "as between groups of carriers without considering the carriers individually," that Congress had not conferred such authority, and that therefore the order was void.

In disposing of this contention the court said that it had no occasion to consider whether Congress conferred such authority or not:

> "for it is clear that the Commission did not base its order upon any such theory."

Continuing, the court said the order:

> "is based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier."

The court concluded that Congress authorized the method of proof and of adjudication pursued, and that Congress could so authorize this consistently with the constitution, saying (p. 197):

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief."

The court referred to the practice, before the Transportation Act, of the Commission adjudicating comprehensively upon substantially all rates in a large territory, made by a single order and in large part on evidence deemed typical of the whole rate structure. Justifying this practice, the court said (p. 198):

"It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it."

Disposing of the constitutional objection to the adoption of the method, the court said (p. 199):

"Congress may, consistently with the due process clause, create rebuttable presumptions (citing cases) and shift the burden of proof (citing cases). It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed."

In *Beaumont, Sour Lake & Western Ry.* vs. *United States, supra*, the prescribed divisions covering a wide range of rates applying between points in the Southwest and so-called Western Trunk Line territory, were attacked, and this court again sustained the group method of prescribing divisions, pointing out (pp. 82-3) that the Commission:

"need not under all circumstances take specific evidence as to each rate of every carrier. When

considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate. That is to say, such typical evidence may sufficiently disclose the facts necessary to enable the Commission duly to consider the divisions of each joint rate to be received by every carrier. *New England Divisions Case*, 261 U. S., 184, 191, 196, 199; *Brimstone R. R. Co.* vs. *United States, supra*, 116."

It was urged in that case by the Southwestern lines (p. 81):

"That the Act requires the Commission to determine the divisions of each carrier upon a consideration of its own rights and needs, and does not authorize the Commission to base its order upon group conditions or upon average conditions in the group."

In its opinion this Court pointed to "the important question" as "whether, under the evidence and having regard to the wide dissimilarities between rates of return earned by individual carriers in each territory, the use of the average or group basis is justified and whether it will produce unreasonable divisions." This "important question" was resolved in favor of the Commission, and its group method of dividing the multitude of rates involved was approved.

C. The Effect of Section 15a (2) of the Interstate Commerce Act, as Amended in 1933.

There is no room for a possible contention that the 1933 amendment to Section 15a (2) of the Interstate Commerce Act brought any change in the group system of prescribing divisions.

Section 15a (2), as amended by the Emergency Railroad Transportation Act, 1933, provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

In *Florida* vs. *United States*, 292 U. S., 1, 7, 8, with particular reference to Section 15a (2), as amended in 1933, the court said:

> ". . . the substituted rule of rate-making by its express terms emphasizes the carriers' need of adequate revenues. . . . The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country."

Moreover, Section 15 (6), under which the Commission fixed the divisions of citrus fruit rates here in controversy, was not amended by the Emergency Railroad Transportation Act of 1933, and conse-

quently, the amendment of Section 15a (2) by the same act can raise no reasonable question as to the propriety of prescribing divisions by the group method. The relationship between Section 15 (6) and Section 15a (2), as amended, is no different than that between Section 13 (4) and Section 15a (2), as amended, which was discussed in *Florida* vs. *United States, supra*, at page 6:

> "Section 13 (4) was not amended by Emergency Railroad Transportation Act, 1933. The authority conferred by Section 13 (4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn. The Congress had knowledge of the construction given Section 13 (4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose."

D. To the Extent That Divisions May Be Lawfully Prescribed in the Aggregate, They May Be Declared Confiscatory in the Aggregate.

In the instant case, as stated by the Commission in its report on reconsideration, 198 I. C. C., 375:

> "We prescribed divisions *in the aggregate* north and south of Ohio River and Virginia gateways of joint rates on citrus fruit, in carloads, from points in Florida to destinations in Official territory." (Italics supplied.)

A reading of the report will reveal the controlling extent to which, in dividing the rates at the gateways between the Northern and Southern carriers respectively, average conditions in the two territories were relied upon. Indeed, except for a limited discussion of operating conditions on certain carriers, a summary analysis of typical divisions accruing to the Northern lines and the listing of return on individual property investments, the Commission gave no specific consideration to any individual road for any individual haul. In substance and effect, the report is rested on aggregate *group* showings.

From the above summary it can be seen that the Commission's procedure from an administrative standpoint was that approved by this court in the several cases which have been previously referred to. If the Commission is to be permitted such latitude in the exercise of its administrative powers in the prescribing of divisions, it is certain that a court should not be subject to narrower limitations in its judicial review of the action of the Commission.

If, under the circumstances that appear in the record in this case, a showing of confiscation with respect to each specific division were required, the possibility of adequate relief from an order of the Commission fixing divisions on such a large body of traffic, handled by so many different lines, would be foreclosed. In fact, the carriers would find themselves in a situation somewhat analogous to that which the Commission frankly admits would be applicable to it if it were forced to prescribe each individual rate or division involved in a general investigation. To the same extent that, as stated by this court in the *New England Divisions Case, supra,*

"Congress intended that a method should be pursued by which the task, which it imposed on the Commission, could be performed," the law must contemplate that confiscation with respect to a large divisional adjustment "in the aggregate" may be shown in a practical and feasible way.

In *Dayton-Goose Creek Railway Company* vs. *U. S., supra*, p. 483, this court discussed the *New England Divisions Case, supra*, and *The Minnesota Rate Cases*, 230 U. S., 352, 435, and, dealing with the relevancy of evidence showing the effect of rates upon the business of the carriers as a whole, said:

> "But this conclusion does not make against the use of a fair return of operating profit as a standard of the reasonableness of rates when the issue is as to the general level of all the rates received by the carrier."

So the court here may properly consider the absence of a fair return of operating profit from the prescribed divisions as a standard by which to determine the issue of confiscation when the general level of all the divisions prescribed for the carriers in a particular territory is assailed.

Aetna Insurance Company vs. *Hyde*, 275 U. S., 440, is relied upon by appellees who claim that there can be no such thing as group confiscation. That this authority is not controlling on the issue here may be quickly shown.

In the first place, in that case it was not claimed by or on behalf of any company that, when applied to its business, the reduced rates for insurance contracts were or would be too low to permit an individ-

ual company to make a reasonable profit or to have just compensation for its contracts of insurance.

In the instant proceeding the allegations are definite and specific, and the claim of confiscation is undoubtedly well and sufficiently pleaded.

All that the Supreme Court had before it in the *Hyde Case, supra*, were "Allegations asserting in general language that the findings, order and reduced rates" were confiscatory and repugnant to the Fourteenth Amendment, and the court held that these were not sufficient. In this case the facts relied on to invoke the constitutional protection and restrain the enforcement of the divisions prescribed by the Commission are specifically set forth in detail as to particular hauls, particular lines, particular systems, and in the aggregate. If the allegations of the petition and the intervening petition were taken to be true as upon a demurrer or motion to dismiss a decree would necessarily go for the appellants.

In the *Hyde Case, supra*, the complaint failed "to show any joint interest or right in or to the business covered by the rate or the protection sought to be invoked." In the present case there is a joint interest alleged and involved. The Commission was asked to divide joint through rates prescribed by it. Each connecting railroad participating in a joint line haul has a joint interest in the entire through rate, and under no theory of confiscation, we submit, could it be the requirement of the law that each connecting railroad should be required to show the confiscatory nature of its individual subdivision. On the contrary, to establish confiscation in a case of this kind it is sufficient to show that the division allowed by the Commission for all connecting lines is confiscatory.

In their evidence in this case, the Northern lines showed confiscation with respect to each division on single-line traffic. This is the evidence "typical in character and ample in quantity" upon which they rely to show confiscation, not only with respect to the specific divisions considered, but also the divisions applicable to joint-line hauls. Certainly, if as this record convincingly shows, the single-line divisions are confiscatory, those applying on competitive, joint or multiple-line hauls must be confiscatory, because it is elementary that joint-line hauls are more expensive than single-line hauls.

Finally, in the *Hyde Case, supra*, the court expressly reserved decision on the point now presented, saying:

> "Assuming that, upon any state of facts, the petitioners would be entitled jointly to have such protection, and as to that no opinion is expressed, it is enough to say that the facts brought forward in this case are not sufficient to raise the question whether the state law or the superintendent's finding of facts or his order is repugnant to the due-process clause of the Fourteenth Amendment."

The case of *Beaumont, S. L. & W. Ry. Co.* vs. *U. S., supra*, was also referred to by opposing counsel in the court below as contrary to the view herein advanced. This contention is sufficiently answered by reference to the closing portion of the opinion in the *Beaumont Case*, where, speaking with respect to the issue of confiscation, the court said (p. 88):

> "There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating

expenses chargeable to the service covered by it plus a reasonable return on property value fairly attributable to that service. There is no foundation in the record for the contention."

In consideration of the foregoing, we respectfully submit that the proof of group confiscation or confiscation in the aggregate must be given consideration on its merits, along with the specific evidence in this record of confiscation as applied to individual hauls, individual lines, and individual systems.

IV

THE ORDER OF THE COMMISSION IS ARBITRARY, AND IN EXCESS OF ITS STATUTORY POWERS, BECAUSE THE COMMISSION ERRONEOUSLY SUBORDINATED ALL MATTERS WHICH UNDER SECTION 15(6) OF THE INTERSTATE COMMERCE ACT IT IS REQUIRED TO CONSIDER TO THE ELEMENT OF SOUTHERN LINES' SUPPOSED "FINANCIAL NEED."

In its first report (R. 55), the Commission said:

> "The weighted average haul of Florida citrus fruit traffic to New England-trunk line territory in 1928-29 was 853 miles in the south and 372 miles in the north, equivalent to a movement from Lake Wales to Altoona via Jacksonville and Richmond."

This is tantamount to saying that if the entire season's movement of over 28,000 cars were converted into one composite shipment the hauls would be as stated. The prescribed rate from Lake Wales to Altoona is $1.05, six cents of which (representing the L-2 arbitrary) is ordered by the Commission to be deducted and given to the Southern lines before the through rate is divided (R. 76). This leaves 99 cents per 100 pounds, in this instance, for dividing between Southern and Northern lines. An average car of citrus fruit as shown by this record weighs about 33,000 pounds, and there would thus be an aggregate of $346.50 per car to be divided between the two sets of carriers. For the respective Northern and Southern hauls from Lake Wales to Altoona the Commission prescribed the following factors based on short line distance:

	Actual Miles	Short Line Miles	Factor
North	372	358	60
South	853	810	194

Converting these factors into percentages we determine that under the Commission's order Northern lines would get $78.40 per car, while Southern lines would get the remainder (including the arbitrary revenue), or $268.10 per car. For each mile Northern lines handle such a car under load they would get about 21 cents, while Southern lines for their very much longer haul would get in excess of 31.4 cents per car for each mile the traffic was hauled. In other words *for each mile of their much longer haul* Southern lines, under the Commission's decision, get 10.4 cents more than do the Northern lines for a mile, *or almost 50 per cent more per car per mile.*

In its second report (R. 82), the Commission said:

> "For a haul of 700 miles in both territories our findings fix a southern factor of 176 and a northern factor of 99, the ratio being 1 : 1.77."

In other words, in this instance, where the haul is exactly the same distance north and south, the Commission fixed a factor which is 77 per cent higher for the Southern lines than the similar factor for appellant Northern lines.

Under the provisions of Section 15 (6) of the Interstate Commerce Act, the Commission, in prescribing and determining the division of joint rates, fares and charges, is directed to give due consideration to various elements which need not be here repeated. This direction to the Commission, however, nowhere specifies or requires that any one element or factor shall be considered of paramount or predominant importance. In fact all are to be considered *per se* and relatively. The "financial condition of the carriers" and the "cost of the service" are not the only

factors to be considered (*New England Divisions*, 62 I. C. C., 513, 516; *Beaumont, S. L. & W. Ry. Co.* v. *U. S.*, 282 U. S. 74; *Brimstone, R. & C. Co.* v. *United States*, 276 U. S. 104). While other facts are recited in the report, it is evident from an analysis thereof that the Commission in this proceeding gave such predominant effect to the alleged "financial need" of Southern lines as to subordinate all other findings of fact thereto. Under no other theory could it have reached the conclusion which it did. The paramount and overshadowing importance which the Commission has in this case given to the alleged revenue needs of the Southern lines is evident from an analysis of its reports because we are entitled to assume that such reports show "complete statements by the Commission of "the grounds upon which its determination rests" (*Beaumont S. L. & W. Ry. Co.* v. *United States et al., supra*).

It will not be our purpose to analyze the Commission's report in detail. Suffice it to say that the Commission found that appellants' divisions "in the aggregate are low" (R. 72), when measured by either mileage or first-class pro-rates, tests suggested by the Commission in other cases, and many of its other findings were of similar import. When all is said and done, the Commission's statement that "we find nothing in the record supporting the view that the eastern lines are entitled to such a large share of the revenue as that accruing from the amounts they have withheld since November 9, 1928," is directly contrary to and unsupported by the findings previously made, some of which have been detailed, and is explainable only by the sentence immediately fol-

lowing it that *"the worse financial condition of the southern lines negatives such a view"* (R. 76).

That "financial need" was the dominating factor in the Commission's view is further demonstrated by the statement in the dissenting opinion, *uncontradicted by the majority, that* (R. 78):

> "To reach their conclusions the majority are obliged to lean heavily on history and on the fact that while both sets of lines are badly off financially the southern lines appear to be worse off than the northern. History does not appeal to me as a factor entitled to much weight, and while financial need is doubtless important, I can not weigh it in the balance near so heavily as do the majority."

It will be recalled that the foregoing expression is by the author of the "financial need" doctrine. (See *New England Divisions,* 66 I. C. C., 196.)

Another very significant thing in the first report of the Commission as showing that "financial need" was the controlling factor in the Commission's conclusion is the "view" based upon presumption merely that the old divisions could not be considered confiscatory and that changing conditions were not convincing that they subsequently became so (R. 75). Undoubtedly this statement was an effort to comply with the requirement state by this court that when "financial needs" of a weaker group of roads are relied upon in giving divisions "larger than justice merely as between the parties would suggest" the share left to connections must be "adequate to avoid a confiscatory result" (*Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456; *United States* v. *Abilene & S. Ry. Co.,* 265 U. S., 274).

In its report on reconsideration, the Commission said (R. 86):

"The statutory mandate that in prescribing divisions 'we shall give due consideration, among other things, to * * * the amount of revenue required to pay their respective operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation,' necessarily requires us to consider the practical effects of the divisions which we fix and to frame them with those effects in mind. To make the means subserve the end can not properly be termed arbitrary action."

Petitioners earnestly contend that the Commission's reports in this case show on their face that "financial need," based on average rates of return from all the business of the carriers, passenger and freight, was unquestionably the dominating and controlling element in the Commission's determination of the excessive divisional factors on citrus fruit prescribed for the Southern lines.

Let us look for a moment at the facts relied upon by the Commission in support of its findings as to the alleged "worse financial condition" of the Southern lines.

The relative average rate of return figures of all Class I carriers in the Eastern district and Southern region for the ten years 1921-30, inclusive, were as follows (R. 66):

Rate of return on tentative value (*Per cent*)

Eastern District	*1921-30*
Freight service	5.895
Passenger service	1.656
All traffic	4.801
Southern Region	
Freight service	6.640
Passenger service	.716 *
All traffic	4.718

* deficit

With respect to this showing the Commission said (R. 67);

> "Defendants contend that the slightly less favorable financial situation of the southern roads, disclosed by this study, is due to losses of passenger revenue and that the official lines should not be called on to absorb the passenger deficiency in the south through a readjustment of divisions of freight rates. With this contention there is little room for disagreement."

At page 754 of its original report (R. 69), the Commission reproduced rate of return figures from the total business of the carriers for 11 individual Northern and 16 individual Southern lines for the year 1930, being the principal railroads handling Florida citrus fruit. This table showed that in each territory there was one line operating at a deficit; that in each territory there were lines that earned from 2 to 5 per cent on their investment; and that there were two lines in the North that had earned 6 per cent or more. Take the two most important citrus carrying roads north and south, the Pennsylvania and the Atlantic Coast Line, the former earned 3.62 per cent and the latter 2.37 per cent on book investment and on all traffic. On basis of these average rates of return the Commission concluded "that the rate of return of the Southern lines was appreciably below that of the eastern roads * * * and in 1929-30 they earned only about 77 per cent of the average return for the carriers in the eastern group" (R. 69-70). The Commission said, however, that "comparison of earnings should take into account the indicated greater profit from passenger service in

the eastern district." It then proceeded to do this "by following a method of spreading deficiency in earnings below a return of 5.75 per cent between freight and passenger service similar to that used in *Divisions of Freight Rates, supra.*" It found (R. 70), in effect, that the actual deficiency of the 11 Northern lines during this period was $358,882,057, while the actual deficiency of the 16 Southern roads during the same period was $112,372,245. The Commission concluded that in the years 1928-31, inclusive:

> "the constructive freight deficiency of the southern roads was 7.7 per cent of freight operating revenue, and that of the eastern lines was 6.6 per cent. The financial condition of the southern lines is therefore less favorable" (R. 70).

The Commission also found "that southern lines require a greater margin of profit per traffic unit than those in the eastern group. * * * In 1930 the eastern lines would have required an average of 3.40 mills per revenue ton mile * * * compared with 3.79 mills for the southern roads" (R. 73). Over a ten-year period 1921-30 Eastern lines actually received 2.13 mills per ton mile net profit from freight service while in the same period Southern lines received a net profit of 2.49 mills per ton-mile (R. 66).

In the face of its own statement that the greater profit from passenger earnings in the East should be taken into account and its finding, after so doing, that the constructive freight deficiency of the Southern roads was but 7.7 per cent of their freight operating revenue as compared with 6.6 per cent for appellant Northern lines—which, of course, is substantial parity

—the Commission nevertheless reached the conclusion that the financial condition of the Southern lines was less favorable. When it is borne in mind that the 11 Northern lines in the 4-year period 1928-31 suffered an average annual freight deficiency from a fair return of $89,720,514, while the annual deficiency of the 16 Southern lines for this period averaged but $28,093,061 (R. 70), it is inconceivable how such a conclusion was reached except by arbitrarily disregarding this finding and permitting average rates of return from all business, including both passenger and freight, to over-ride and dominate all other considerations. In its second report, the Commission attempts to detract somewhat from the force of this showing, and it also reproduces rate of return figures for subsequent years which from a return on total business standpoint "indicate clearly the less profitable operations of the Southern lines in the past 5 years * * *." Taking into account both reports, however, we think it is clearly apparent that the Commission has allowed the alleged financial need of Southern lines to outweigh all its other findings; that on basis of its own conclusions both sets of carriers failed by substantial sums annually to make a fair return on investment chargeable to freight traffic; that the decision is contrary to expressions by both the Commission and the courts that under Section 15(6) no one of the elements which the Commission is to consider is predominant; and that "the rule or formula prescribing the divisions" lacks the essential requirement that "a sound basis" for it "is essential to compliance with the act" (*Beaumont S. L. & W. Ry. Co.* v. *United States,* 282 U. S., 74).

It is apparent, therefore, that the Commission reached its conclusion and made its order on, virtually, but one factor *i. e.,* its conception—erroneous, the appellants contend—of the relative financial needs of the carriers. This is the *"substance"* of the exercise of the power herein. The Commission has recited, in effect, that it duly considered all the factors which demand consideration under the mandate of the statute. This is the *"shadow"* of the exercise of the Commission's power.

When this Honorable Court looks to the "substance" and not the "shadow" it will be found that the Commission has decided this controversy on virtually one ground. Since this has been shown to be contrary to law, the order must be set aside—on this ground alone—as being an invalid exercise of the Commission's power *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S., 541, 547).

V

THE ORDER OF THE COMMISSION IS ARBITRARY, ILLEGAL, VOID, AND IN EXCESS OF ITS STATUTORY POWERS IN THAT, WHILE PURPORTING TO GIVE "DUE CONSIDERATION" TO A "FAIR RETURN" ON RAILWAY PROPERTY OF THE SOUTHERN LINES, AS REQUIRED BY SECTION 15(6) OF THE INTERSTATE COMMERCE ACT, IT CONSIDERED MERELY THE RATES OF RETURN OF SAID SOUTHERN LINES FROM THE ENTIRE OPERATIONS OF SUCH LINES INSTEAD OF GIVING DUE CONSIDERATION TO A FAIR RETURN ON SOUTHERN LINES' PROPERTY FAIRLY ATTRIBUTABLE TO THE SERVICE OF TRANSPORTING CITRUS FRUIT, WHICH THE COMMISSION FOUND "WAS BY FAR THE MOST LUCRATIVE TRAFFIC" ENJOYED BY THE PRINCIPAL SOUTHERN LINE.

The rate of return figures relied upon by the Commission in reaching its conclusion as to the financial needs of the Southern lines have already been shown (*ante*, p. 143). Conceding that these bare rate of return figures from *all business* handled by the Southern and Northern lines indicate that certain Southern lines are somewhat worse off financially, the simple question raised by this point is whether the Commission may, under the provisions of Section 15 (6) of the Act, give to Southern lines abnormally large divisions, far in excess of a fair return on such investment as is *fairly attributable* to the transportation of citrus fruit—their most lucrative traffic—while reducing Northern lines' proportions to a point where nothing is left for return on investment. We earnestly contend that the circumstance that the Atlantic Coast Line, for example, has in the past few years made a somewhat lower rate of return on its total business, passenger and freight, than has the Pennsylvania—although neither has made anything like a fair return on its property investments during this period—in no way warrants the Commission in requiring the Pennsylvania to accept confiscatory divi-

sions out of non-confiscatory rates in order that the Atlantic Coast Line may receive vastly more than a fair return. The injustice of such a procedure is emphasized by the fact that the Commission itself has found that citrus fruit "was by far the most lucrative traffic which the Atlantic Coast Line had" in the period 1928-31, inclusive, during practically all of which time the divisions now found unjust, unreasonable, and inequitable were in effect.

Section 15 (6) of the Interstate Commerce Act requires that the Commission shall, in prescribing divisions between carriers give due consideration, among other things, to "the amount of revenue required to pay their respective operating expenses, taxes, *and a fair return on their railway property held for and used in the service of transportation.*" Appellants have already demonstrated, and the Commission's reports show, that the prescribed divisional factors, so far as financial need is concerned, were predicated on the "worse financial condition" of the Southern lines, as reflected by average rates of return from their total business on their entire investment (R. 76, 85, 86).

Appellants contend that under a correct and proper interpretation of Section 15(6) the average rates of return *from all business* of the Southern lines *on all their property* were improperly considered by the Commission as one of the factors to which it is directed to give "due consideration," and that the provisions of Section 15(6) with respect to the due consideration that must be given to "operating expenses, taxes, and a fair return" must, in a case involving but a single commodity, necessarily bear some reasonable relation to the ratio that the quantum and cost

of the service involved bear to the total transportation performed by interested carriers. In other words, the Commission, for both Northern and Southern lines, should have considered a fair return on only such property as is devoted or *fairly attributable* to the transportation of citrus fruit.

Appellants appreciate that in making this contention they seem to be running counter to explicit expressions by this court on the point, but when the facts in the case which announced the "financial need" doctrine are analyzed, it will be seen that the case affords no precedent whatever for a case such as the one now before the court. On the contrary, expressions by the Commission, and by this court in other cases, indicate that it is the return on property "fairly attributable" to the transportation service involved and not the rate of return from all business on all property that should govern.

The first case involving divisions which came before this court after the Commission's power over divisions was broadened by the Transportation Act, 1920, was the *New England Divisions Case,* 261 U. S., 184. Shortly thereafter, in *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U. S., 456, 477 (not a divisions case), the court, in further construing the Transportation Act, 1920, said:

> "In the *New England Divisions Case,* 261 U. S., 184, it was held that under Section 418 the Commission in making division of joint rates between groups of carriers might, in the public interest, consult the financial needs of a weaker group in order to maintain it in effective

operation as part of an adequate transportation system and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result."

Obviously this language must be read in the light of the broad questions which the court had before it, and especially in the light of what it actually did in the *New England Divisions Case, supra.* These two cases have been cited in every subsequent decision where "financial need" was stressed, and unquestionably the *New England Divisions Case, supra,* forms the basis for the doctrine. That case resulted from the Commission's decision in *New England Divisions,* 66 I. C. C., 196. It clearly appeared from the decision that the Commission was acting *in the public interest* to relieve the financial needs of the New England lines so as to keep them in effective operation. The facts appear in this court's decision and need not be repeated. The court referred to the policy of the Transportation Act, and pointed out that the provision concerning divisions was an integral and indispensable part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections.

It also appears from this court's opinion that it regarded the Commission's order in *New England Divisions, supra,* as a supplement to the order making a general 40 per cent increase in rates entered in *Ex Parte 74, Increased Rates, 1920,* 58 I. C. C. 220. This is clearly shown by the following language from the opinion of the court at page 196:

"What the Commission did was to raise the additional revenues needed by the New England

lines, in part, directly, through increase of all rates 40 per cent and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in *Ex parte* 74. * * * The order here in question may properly be deemed a supplement to, or modification of, that entered in *Ex parte* 74."

The complaint before the Commission in *New England Divisions, supra,* involved the divisions of all traffic moving between that section and the remainder of the United States, and the order which was before the court involved all joint class rates and rates that were divided on the same basis as class rates. The provisions of Section 15(6) were regarded by the court as "an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections," and as pointed out by the court in the foregoing quotation, "no part of the revenues" transferred to the New England lines "is paid by the western lines. All is paid by the community pursuant to the single rate increase ordered in *Ex parte* 74."

In the instant proceedings we have an entirely different situation. The rates for which divisions are prescribed are on a single commodity and were *reduced* by the Commission "quite largely in the light of evidence concerning improved conditions on the Florida lines which had arisen since the former rates were established" (R. 75). The Commission elimi-

nated the Florida "gathering charges" and established what it said should be "in fact, as well as in name," joint through rates (*ante*, p. 9).

Five years later the condition of the Florida lines, as well as that of all other carriers, has changed for the worse. It so happens that certain Northern lines have not been affected in quite the same degree as have certain of the Southern lines, although neither group of carriers has made anything approaching a fair return on all traffic.

In the circumstances it is inconceivable that the "financial need" principle announced in *New England Divisions Case, supra,* can have any possible bearing on the instant case.

But there is still another important reason why the "financial need" principle has no application here. As the first report of the Commission itself shows, the *divisions of the rates on citrus fruit are but a part of* a general divisional controversy between Northern and Southern lines involving the rates on classes and all commodities between points in Official territory and points in Southern territory. The question of divisions of all interterritotrial traffic other than citrus fruit is still pending before the Commission, and pursuant to the provisions of Section 15(6) the Commission must, when that proceeding comes before it, "give due consideration, among other things," to the amount of revenue required to pay operating expenses, taxes, and a fair return on railway property held for and used in the service of transportation. An analysis of the Commission's reports in the instant proceeding, which involves but one commodity, shows that to an important extent the Commission gave weight to the alleged worse financial condition

of the Southern lines as reflected by the average rates of return for the *total business* of such carriers, as we have already shown. The Southern lines have made a separate divisional presentation in the general case as to each important block of interterritorial tonnage, moving between Official territory and Florida. The same average rates of return *from the total business of the Southern carriers* that are so strongly relied upon as warranting the divisions prescribed on citrus fruit, are also relied upon in connection with divisions of the rates on other commodities or classes of interterritorial traffic. Petitioners therefore contend that the provisions of section 15(6) with respect to the due consideration that must be given operating expenses, taxes, and a fair return on investment, must of necessity bear some reasonable relation to the ratio that the quantum and cost of the service involved bear to the total transportation service performed by the interested carriers. The point petitioners have in mind may perhaps be best expressed by quoting from the Commission's decision in the *New England Divisions Case,* 66 I. C. C., 196, 207, where, after directing that carriers proceed as expeditiously as possible to study and revise their divisions, the Commission stated:

> * * * "In making a study of such specific rates, every effort should be made to ascertain with such approximate accuracy as may prove possible the respective costs of the service performed by the various participating carriers, including in such costs *a fair share* of the charges attributable to taxes and a reasonable return upon the property. The other elements mentioned in the statute, in addition to mileage, should likewise be considered." (Italics supplied.)

The correctness of this view also finds support in the language of this court in *Beaumont S. L. & W. R. Co. et al.* vs. *U. S.*, 282 U. S., 74, 87. In that case there were wide dissimilarities between the rates of return earned by individual carriers in each territory, and the Southwestern lines contended that the prescribed divisions would operate in some instances to transfer substantial sums from very weak carriers in Southwestern territory to prosperous ones in Western territory. Much the same situation exists in the instant case. This court said at pages 87-88:

> "* * * It is not suggested that the operating expenses of each carrier attributable to the traffic in question vary as does its rate of return on its business as a whole. Nor does it appear that the carriers having the highest rates of return from their total business or from that in the territory in which they belong, move the traffic in question at comparatively low costs. Return from total business of a carrier and the cost of handling the traffic covered by the joint rates are not dependent upon the same facts; the relation between them is slight and remote. *For aught that appears the carriers having little or no return on their total business may move the traffic in question at low costs and realize a satisfactory percentage of profit on that part of their business.* (Italics supplied.)

Later, in the decision at page 89, the court indicated that it was the "operating expenses chargeable to the service" covered by the divisions "plus a reasonable return on property value fairly attributable to that service" which should be the criterion.

In the present proceeding only one commodity is involved, which commodity the Commission, as has

already been noted, said in the original report "was by far the most lucrative traffic which the Atlantic Coast Line had" in the period 1928-31, inclusive. The original report further states that of the total citrus fruit tonnage from Florida during the years 1929, 1930 and 1931, 62 per cent originated on the Atlantic Coast Line.

In the light of the comparisons previously herein made, which show that, using the same formula for determining Southern lines' approximate expenses per car as was used for Northern lines, plus an allowance for taxes and car rental, the Southern lines would have received in the season of 1928-29 the additional sum of about $1,767,000.00, or 12.95 per cent return on the allocable portion of their investment "fairly attributable" to citrus fruit traffic, it can hardly be denied that the citrus traffic is highly profitable to the Southern lines.

It follows that consideration of the average rates of return from the total business of the carriers in determining the financial need of the Southern lines in fixing divisions on citrus fruit is not responsive to the statutory requirement that due consideration be given to "the amount of revenue required to pay their operating expenses, taxes, and a fair return on railroad property held for and used in the service of transportation" of citrus fruit, a commodity which "was by far the most lucrative traffic" that the carrier originating 62 per cent of the total traffic enjoyed. The fact that the Southern carriers may make little or no return on their total business does not entitle them to have divisions on their most lucrative traffic fixed at the expense of their connections.

CONCLUSION

Appellants believe that they have established that the order assailed is in contravention of the Fifth Amendment to the Constitution, and in violation of Section 15(6) of the Interstate Commerce Act, and they therefore respectfully pray that the decree of the lower court be reversed and the case remanded with instructions that the injunction sought be granted.

Respectfully submitted,

E. L. BEACH
JOSEPH F. ESHELMAN
M. CARTER HALL
JERVIS LANGDON, JR.
CHARLES R. WEBBER
Solicitors for Appellants

FREDERIC D. MCKENNEY
Of Counsel

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